THE PRACTICE OF CONVEYANCING.

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VOL. II.

LAW TIMES OFFICE:
29, ESSEX STREET, STRAND, LONDON.

1857.

THE

COMPLETE PRACTICE

OF THE

LAW OF ENGLAND,

AS ESTABLISHED BY THE

RECENT STATUTES, ORDERS, RULES, &c.

VOL. VII.

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BOOK THE THIRD.

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BOOK THE THIRD.

LEASES, LICENCES, ATTORNMENTS, AND GRANTS OF EASEMENTS.

CHAPTER I.

CONDITIONS AND AGREEMENTS FOR LEASES.

I. Introductory Observations.

Every lease that is granted must necessarily be preceded by an executory contract, either verbal or written: (1 Platt on Leases, 567.) But it is the wisest plan in every instance to reduce the whole terms of the intended lease into writing, which should then be signed by all the parties or their lawfully authorized agents, and thus constitute a valid binding contract, in accordance with the Statute of Frauds. It is true, indeed, as we have remarked in a preceding part of the present work, that it is not essential to the establishment of a valid contract, whether for the purchase of lands, or the

granting a lease of them, that the instrument creating it should be a formal one, as it may even be established through the medium of a correspondence carried on by a series of letters, provided such letters contain the signatures of the parties to be bound by it: whilst, in equity, a contract may sometimes be enforced, although the formalities required by the Statute of Frauds have been altogether omitted; as where the agreement has been confessed, or has been substantially or in part performed, in either of which instances the court has decreed its specific execution, notwithstanding the agreement has not been signed, or even reduced into writing: (*Lester* v. *Foxcraft*, Colles P. C. 108, cited Gilb. Eq. Rep. 4.) Still a contract thus constituted can never be relied upon, as it would often be difficult, and sometimes impossible, to prove some of its most essential particulars, in which event a court of equity would be unable to carry it specifically into effect; added to which a parol agreement, although partly performed, is only binding between the immediate parties making it, so that, if entered with a tenant for life, a remainder man would not be bound by it, unless it could be shown that he himself acquiesced in the arrangement (*Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52), and did such acts with full knowledge of the nature of the transaction, from which such acquiescence may reasonably be presumed (*Reynolds* v. *Hesing*, 1 You. 346); whilst in every case where the terms of the contract are disputed, delay has inevitably been produced, and heavy expenses oftentimes incurred, all of which might have been prevented by a well penned instrument in the first instance setting out the terms upon which the lease is really intended to be made.

Preliminary steps to entering into the contract.]—But before any attempt is made to prepare the contract, the lessor's solicitor should ascertain from his client not only upon what terms the latter proposes to let the premises, but also whether he has such an estate or interest therein, or power over it, as will enable him to grant the proposed lease, and insure to the lessee the free and uninterrupted enjoyment of the property during the whole term intended to be demised.

Where the lessor takes only a limited interest in the property.] —If the lessor takes only a limited interest in the property, as a tenant for life, for years, or for any other limited interest, care must be taken that he does not bind himself to grant a longer term than is commensurate with such estate or interest; and where the lease is to be granted under a

power of leasing, equal attention will be required to prevent the contract from embracing anything inconsistent with the terms of such power; and whenever the lessor himself has only a leasehold estate, and the lease creating it contains any unusual or burdensome covenants, or any other special matter whatever, the whole of these things should be distinctly set out in the contract or conditions, at the same time stating that the purchaser is to buy subject to them.

Where the power of leasing is restricted.]—And if there are any restrictions whatever as to the powers of granting a lease, as where the lessor is a copyholder, whose granting a lease for more than one year without the licence of the lord would be a forfeiture of his estate; or a tenant under a term, who is prohibited by his lease from assigning or under-letting without the lessor's licence; or where the consent of several parties is necessary, as in the case of a lease intended to be granted by either a mortgagor or mortgagee, neither of whom, as we have already seen, is capable of granting a lease without the other's concurrence; or in the case of leases under powers, where the consent of some person or other is expressly required, in every one of these instances the intended lessor should never enter into any contract until he is perfectly certain that he will be able to obtain such necessary concurrence and consent, and thus remove every obstacle which may happen to stand in the way of the free exercise of his leasing powers.

Duties of lessee's solicitor.]—A lessee's solicitor, before he advises his client to accept the lease, should ascertain whether the lessor has the power to grant it, and to insure the tenant the peaceable enjoyment of the property during the continuance of the term, unfettered by any covenants or restrictions as to the occupation or enjoyment of the property. This is an essential subject of inquiry whenever the lessor himself is only a lessee of the premises; for in a case of this kind, if an underlessee were to enter into possession of the premises without making any inquiry respecting the covenants in the original lease, and such original lease contained any prohibitory or restrictive covenants, such as not to carry on certain trades on the premises, the underlessee might be compelled to enter into a covenant to that effect, notwithstanding the written contract, under which he agreed to take the premises, was altogether silent upon that subject: (*Cosser* v. *Collinge*, 3 Myl. & Kee. 283.)

As to leases by tenants in tail.]—If the intended lessor is a tenant in tail, who proposes to grant a lease under the enabling statute (32 Hen. 8, c. 28), it will be proper to find out whether or not he has issue likely to succeed to the entail, and to endure as long as the proposed term; for it must be remembered that although the above-mentioned statute authorizes tenants in tail to grant leases for twenty-one years, or three lives, which shall be binding on the issue in tail, such leases are in no wise binding on the remainder man or reversioner; so that, if the tenant in tail has no issue inheritable under the entail, he can create no longer a term than a tenant for life could grant, and any lease made by him will determine with his death, as it will, under any other circumstances, by the determination of his estate tail.

As to leases by married women under statute 32 *Hen.* 8.] —With respect to the powers of leasing conferred upon husbands seised in right of their wives to grant leases under the statute (32 Hen. 8, c. 28), it must be observed that this statute extends only to an actual lease, consequently a contract for a lease will not be enforced against the wife in case she should happen to survive her husband, or against her heirs at whatever time she may happen to die: (Cow. 267; *Anon.* 2 Freem. 224.)

II. PRACTICAL DIRECTIONS FOR PREPARING THE CONTRACT OR TERMS UPON WHICH THE PREMISES ARE TO BE DEMISED.

In penning the contract or terms for letting, the following directions should be strictly attended to:—

IN THE FIRST PLACE, unless the lessor intends to show his title to the demised premises, there should be an express stipulation that he shall not be required to do so; otherwise, although it is not the usual practice for a lessee to call for a lessor's title, and it seems a lessee has no power to enforce its production (*Purvis* v. *Rayer*, 9 Pri. 516); still, a lessor cannot, except in the case of a bishop's lease (*Souter* v. *Drake*, 5 B. & Ad. 992), support a bill in equity for a specific performance, or maintain an action at law against an intended lessee for a breach of contract, without such production of title: (*Waring* v. *Macreth*, 11 Ves. 343.) Auctioneers, also, when conducting the letting of any property, should be particularly careful to insert a provision of this kind in their particulars or conditions, as an omission to do so would be construed as an act of such gross negli-

gence as to afford a good defence to an action by an auctioneer against his employer for his work and labour in the conduct of the sale: (*Denew* v. *Deverall*, cited by Lord Denman in *Souter* v. *Drake*, 5 B. & Ald. 1001.)

Disadvantages incurred by intended lessees who enter into possession, who are desirous that lessor should produce his title.]—On the other hand, lessees who, in the absence of any stipulation to that effect, intend to insist on the lessor's producing his title before they accept a lease from him, should be careful how they enter into possession, or exercise any acts of ownership over the property, for if they do this, they will be considered as waiving all right on their part to investigate the lessor's title: (*Simpson* v. *Ladd*, V.-C. Stuart's Court, 24 L. T. Rep. 50.)

SECONDLY. The parcels should be described with the same accuracy as the particulars or conditions of an actual sale, or a contract for an absolute purchase of the property, so that when the lease comes to be prepared, and the parcels particularly set out and described, no dispute can possibly arise as to their being the same as were included in the contract and intended to be comprised in the lease. This, however, may sometimes be done very shortly, and premises of considerable exetnt may often be safely included in a short general description, but it is most essential that the description should be an accurate one. On the other hand, the lessee ought to see that the description really is sufficient to embrace the whole property he intends to take, and whenever the parcels are described by reference to their being in the possession of a third party, the lessee or his solicitor should discover the exact quantity of premises so possessed; for it has been held that where a lease was made of a messuage and two yards of land in B., no more of the two-yard land was held to pass than was in G.'s possession, although part not in his possession had from time out of mind been part of the two-yard land: (*Bartlett* v. *Wright*, Cro. Eliz. 299.) So, where the lands are described to be in a particular parish, the lessee should ascertain that the whole of the lands are situate in that parish, and no other; for it seems that only the lands in the parish actually mentioned will be included under the above description: (*Dowtie's case*, 3 Co. 9 b.) Whenever, also, there is a general description of the property, if a particular description is added, care must be taken to ascertain that the latter be correct, as the particular description will control the former one; although it is otherwise

when a sufficient description is set forth of the premises, as by giving a particular name to certain lands, in which case a false demonstration may be rejected; as, for example, if a lease was to be made of all the lands in the parish of A., containing ten acres, where in fact they contain twenty acres, the whole twenty acres will nevertheless pass: (*Willoughby* v. *Foster*, 1 Dy. 806, pl. 56.) The above-mentioned distinction was clearly pointed out by Parke, J., in the case of *Doe d. Smith* v. *Galloway*: (5 B. & Ad. 43; S. C., 3 Nev. & Man. 240.) In that case, a lease was made of all that part of the park called Blenheim, situated in the county of Oxford, and now in the occupation of one R. S., in a direct line across the said park, from the gate called Old Woodstock Lodge, lying on the north-west side of the said line, &c. [*setting out other abuttals*], together with the farm-houses and other houses, &c., belonging or appertaining to the said premises, and which are now in the occupation of the said R. S.; it was held that a cottage and appurtenances within the line and abuttals set out in the lease, but not in the occupation of R. S., would pass. But had it been a grant of all that part now in the occupation of R. S., and lying on the north-west side of the line, the occupation would have been a material part of the description, and nothing would have passed which was not both in the occupation of R. S., and on the north-west side of the line: (2 Platt on Leases, 29.)

THIRDLY. If any portion of the property is intended to be excepted out of the lease, such excepted portion should be clearly defined, so as to distinguish it entirely from those portions which are intended to pass to the lessee. In like manner, if any rights are to be reserved to the lessor, which he would not be strictly entitled to exercise by virtue of that character alone, the nature of such rights should be set out in terms sufficiently comprehensive to confer them, the benefit of which a lessor has sometimes lost for want of sufficient care in framing the reservation. Hence, if a lessor intends to reserve a general right of way over the property, it is not only necessary that he should expressly reserve that right, but he should also frame the reservation in such terms as to include every kind of right of way he intends to retain or exercise; for a reservation of a right of way on foot, and for horses, oxen, cattle, and sheep, does not give any right of way for carriages, or even to lead manure, as that implies drawing a carriage: (*Brunton* v. *Hall*, 1 Ga. & Dav. 207.) Neither will a covenant by a lessee to pull down the corner

of a house leased to him, for the purpose of letting the lessor make a cart-way over the spot, confer such a right: (*Good* v. *Hill*, 2 Esp. N. P. C. 690.) So, where a right of sporting is reserved, if the lessor intends to obtain any advantage beyond the mere reservation, such as that the tenant shall warn off trespassers, or allow actions to be brought against them in his name, all these particulars should be expressly stipulated for in the contract, otherwise the lessor, under a general reservation of the right of shooting the game, will have no right to insist upon having any of the latter particulars inserted in the lease; and it must always be remembered, that whenever there is any reasonable degree of doubt as to the meaning of any exception contained in, or to be contained in a lease, the words of exception, being the words of the lessor, are to be construed favourably for the lessee and against the lessor: (*Earl of Cardigan* v. *Armitage*, 2 B. & C. 206; *Bullen* v. *Denning*, 5 B. & C. 842, 847.)

FOURTHLY. The term for which the lease is to be granted should be distinctly set out, it being essential to the creation of a term of years that it should have a certain beginning and a certain ending (1 Ins. 486; Bac. Abr. tit. "Lease," L.); still this will not exclude the term from being made determinable by the happening of some event before its appointed expiration by effluxion of time, as in the common instance of a lease for a term of ninety-nine years determinable upon a life or lives. Neither does the rule above laid down exclude conditions to defeat, or collateral determinations to put an end to the term before it has filled its full measure of continuance: (2 Prest. Conv. 162; Hughes Pract. Sales, 511, 2nd edit.) Whatever, therefore, the nature of the term is to be, it should be clearly stated, and if it is to be determinable under particular circumstances, the manner in which it is to be so determinable should be distinctly pointed out. Thus if, as not unfrequently happens, the lease is to be made determinable by either the landlord or tenant before its regular expiration by effluxion of time, it should be stated that the lease is to contain a proviso to that effect, and at the same time the terms upon which its determination shall take place; as, for example, by one party giving the other six calendar months' previous notice in writing at the end of the first three, five, or seven years of the term, or the like: (see the form 1 Con. Prec., Part III., Section I., No. II., clause 9, p. 441.) In this clause it should be expressly stated that the term may be made determinable either by the lessor or the lessee, and not state merely that

it may be determinable at certain periods of the term, without at the same time saying by whom it is to be determined; as in the latter case, it seems, the right of determining the term would be the privilege of the lessee only; and if the contract gives the lessor no right to determine the term before its regular expiration, he will have no right to insist upon having this privilege conferred upon him by a lease which is afterwards prepared in pursuance of the terms of such contract: (*Dann* v. *Spurrier*, 7 Ves. 231; *Doe d. Webb* v. *Dixon*, 19 East, 15; *Price* v. *Dyer*, 17 Ves. 363; *Edge* v. *Strafford*, 1 Tyr. 293.) It will also be advantageous to the lessor's interests to make the lessee's option for determining the term conditional upon payment of the rent and other outgoings due from him up to the period of determination, and the performance of all the lessee's covenants; for without this provision, the lessee might put an end to the lease merely on giving notice, leaving the rents, rates, duties, and other outgoings charged on the property unpaid, and the premises in a state of dilapidation; whilst, by adopting the course above recommended, the qualification will amount to a condition precedent, and exclude the lessee from the privilege of determining the term, without a strict compliance with the above mentioned conditions: (2 Platte on Leases, 76 *Porter* v. *Shepherd*, 6 T. R. 665.)

FIFTHLY. The amount of rent, and the times of payment, as yearly, half-yearly, quarterly, or any other stated periods at which such payments are to be made, ought to be specified; and if it is intended that any suspension or abatement of the rent is to take place in case of the whole or partial destruction of the demised premises by fire or any other accident, the terms and circumstances under which the abatement is to be made should be mentioned (see forms adapted to these purposes, 1 Con. Prec., Part III., Section I., No. II., clauses 11 to 13 inclusive, pp. 442, 443), otherwise the tenant would have no right to insist upon its insertion in the lease; in the absence of which, he would be liable to the payment of the full amount of rent reserved throughout the entire continuance of his term, notwithstanding the whole premises may have been actually destroyed either by fire, flood, tempest, or the violence of a lawless mob, which the lessor can neither be compelled to rebuild or repair unless he has actually agreed to do so (*Pindar* v. *Ainsley*, cited by Buller, J., in *Balfour* v. *Weston*, 1 T. R. 312); and no such engagement will be either construed or implied from his covenant for quiet enjoyment: (*Brown* v. *Quilter*, 2 Eden, 219.)

SIXTHLY. It will always be advisable to stipulate by whom the rates, taxes, and all other outgoings are to be defrayed. Some of these, in the absence of a stipulation to the contrary, fall upon the landlord, and others upon the tenant; but all these, with the exception of the property and income tax, may, by matter of arrangement between the landlord and tenant, be made payable by either of them. Yet, whenever either the landlord or the tenant is to discharge any of those outgoings which the other, in the absence of any such stipulation, would have to pay, the nature of such outgoing should be distinctly stated. Thus, if the landlord is intended to pay the rates as well as the taxes, it will be necessary to extend the clause to charges to which the owner or occupier will be liable, as well as those which will be chargeable upon the lands demised (*Theed* v. *Starkey*, 8 Mod. 314); for a covenant to indemnify the lessee against all duties, charges, and taxes whatsoever to be imposed upon the lands, except tithes, will not include church and poor rates, for these are charges upon the person or occupier, and not charges on the land: (*Harrison* v. *Bullcock*, 1 H. Blackst. 172.) But a general covenant to pay all taxes, or to pay the rent clear of all taxes, will include the land tax, as also all future taxes of a like nature, and for purposes similar to those in existence at the time of the demise: (*Amfield* v. *Wright*, 1 Ry. & Moo. 246.)

Land tax.]—With respect to the land tax, in the absence of any stipulation between the landlord and the tenant, the tenant will be allowed to deduct the amount out of his rent (38 Geo. 3, c. 5, made perpetual by stat. 38 Geo. 3, c. 60, ss. 17 and 18), but the tenant will lose this lien if he fails to make this deduction out of his current rent (see 1 Con. Prec., p. 436, note (*b*)); otherwise an assignee of the reversion might be called upon to allow a deduction which the tenant had neglected to make upon the proper party who ought to discharge it: (*Stubbs* v. *Parsons*, 3 Barn. & Ald. 516.) And it may be stipulated that the tenant shall exonerate the landlord from this payment, and it has been held that a general covenant to pay all taxes, or to pay the rent without deduction, will include the land tax: (*Amfield* v. *Wright*, 1 Ry. & Moo. 246.) And a covenant to pay all Parliamentary, parochial and other taxes, tithes, and assessments, will include a rentcharge on the demised premises payable to a party who has redeemed the land tax formerly charged thereon: (*Ward* v. *Const*, 10 Barn. & C. 635.)

Property and income tax.]—With respect to the property

or income tax, no contract or covenant between landlord or tenant is to be permitted to exonerate the former from its payment, which, although assessed on the rent payable by the lessee in the first instance, and charged on and payable by him, he is entitled to deduct out of the next payment of his rent (5 & 6 Vict. c. 35, s. 60, sched. A., No. IV., 9th rule), which the landlord is bound to allow; but in this case, as with respect to the land tax before mentioned, the tenant must be careful to make this deduction out of his current rent, otherwise he will lose his lien: (*Denby* v. *Moor*, 1 Barn. & Ald. 123; *Andrew* v. *Hancock*, 1 Brod. & Bing. 37.) But all covenants, contracts, or agreements as between the landlord and the tenant to exonerate the former from the property tax will be absolutely void; still, this will not defeat a distinct covenant for payment of the rent "clear of all Parliamentary, parochial and other taxes, rates, assessments, and deductions whatsoever;" inasmuch as the words must be understood to refer to taxes which the tenant may lawfully covenant to pay in exoneration of his landlord: (*Gaskill* v. *King*, 11 East, 165; 2 Platt on Leases, 180; 1 Con. Prec. 437, note (*c*).)

Sewers rate.]—A sewers rate is not comprised in a covenant to pay all rates, parochial and Parliamentary (*Palmer* v. *Earith*, 14 Mees. & Wels. 428); although it would, it seems, be included under the terms "all outgoings whatsoever;" and it has also been held that the word "*scot*," which was commonly applied to a sewers rate on marsh lands, showed that the sewers rate was included: (*Waller* v. *Andrews*, 3 Mees. & Wels. 312.)

Practical suggestions.]—In order, therefore, to prevent any doubt or question from arising with respect to any of the above matters, it will be advisable to insert a stipulation that the rent is to be payable—

"Clear of all rates, taxes, and assessments whatsoever (including the land tax and sewers rates) which now are, or at any time during the continuance of the term may be, assessed upon the said premises or upon the said (*lessor*) or the said (*lessee*) on account thereof, or on account of the rent reserved in respect thereof (except the property or income tax) by authority of Parliament or otherwise howsoever."

SEVENTHLY. It is also most essential that the contract should explain the manner in which the premises are to be kept in repair, and to stipulate expressly what portions are to be repaired by the landlord and what by the tenant; otherwise, in conformity with a general rule that with a very

few exceptions has been long prevalent throughout every part of the kingdom, the burthen of repairs will fall upon the lessee, who, if he files his bill upon the contract, will not be entitled to a specific performance unless he consents to enter into a covenant to this effect: (*Burnell* v. *Harrison*, Pre. Cha. 25.) But it seems that in the City of London (Bro. Abr. "Dette," pl. 18; *Hart* v. *Windson*, 12 Mees. & Wels. 138), in Norfolk, and in the Isle of Ely, a different usage prevails: (*Bulwell* v. *Harrison*, *supra*.)

As to tenant's liability to repairs in the absence of any covenant to that effect.]—Independently of any covenant or agreement, it appears that a tenant is bound to keep the premises wind and water-tight (*Anworth* v. *Johnson*, 5 Car. & Pay. 229; *Leach* v. *Thomas*, 7 *ib.* 327; *Fisher* v. *Maguire*, Arms. Mag. & Og. 51), to replace doors and windows that are broken during his occupation: (*Cheetham* v. *Hampson*, 4 T. R. 318; *Gregory* v. *Mighell*, 18 Ves. 331.) But he is not liable for the mere wear and tear of the premises, and therefore is not bound to replace doors and sashes worn out by time (*Horsefall* v. *Mather*, Holt N. P. C. 7), or to put on a new roof (*Ferguson* v. ——, 2 Esp. N. P. C. 590), or to rebuild the premises if burnt down, or become ruinous by other accident (*Anworth* v. *Johnson*, *supra*), or to make substantial and lasting, or what are usually termed general repairs: (*Doe ex dem. Thomas* v. *Arney*, 12 Ad. & Ell. 476.) And it has even been held that a tenant of a house under a written agreement, by which he undertakes to keep it in tenantable repair during the term, is justified in quitting it in the course of the term without notice if the premises become unwholesome for want of sufficient drainage, and cannot be kept dry without extravagant and unreasonable labour and expense on his part: (*Collins* v. *Barrow*, 1 Mood. & Rob. 112.)

EIGHTHLY. It will always be the safer plan in every case to specify what covenants the lease is to contain, and not to state, as is the frequent practice; that the lease is to contain "the usual covenants," even when no other than what are commonly termed usual covenants are contemplated between the parties, for this has given rise to numberless disputes; as there have often been, and still are, many divided opinions as to what kind of covenants are, or are not strictly included under those terms. A covenant not to assign without licence, although considered as a usual covenant, has nevertheless been held not to come under the description of "*a common*

and usual covenant:" (*Henderson* v. *Hay*, 3 Bro. C. C. 362; *Church* v. *Brown*, 15 Ves. 529; *Van* v. *Cope*, 3 Myl. & Kee. 269.) And in a more recent case, it was held that the words "*usual covenants*" in an agreement for a farming lease, were not to apply to the usual periods for payment of rent, but only to agricultural covenants: (*Haynes* v. *Brown*, 21 L. T. Rep. 24.)

Covenants of a special nature should be distinctly specified.]—Any covenants of a special nature ought of course to be distinctly specified; as should also every special condition or proviso relating to the enjoyment or occupation of the property, or anything to be done or performed respecting it, or relating to the mode in which the tenancy is to be determined; otherwise either party may object to have them inserted in the lease.

As to repairs.]—In the stipulation with respect to repairs, it should be stated that the tenant shall *keep* as well as *leave* the premises in repair; for, if the covenant be merely to *leave* in repair, no action will lie for not keeping the premises in repair; consequently no action can in such case be brought against the tenant for non-repairs during the continuance of the term, however ruinous he may allow the property to become; for until the premises are out of repair at the end of the term, no breach of covenant will have been incurred: (*Walter* v. *Montague*, 2 Roll. Abr. 382; Shep. Touch. 173.) But if the covenant is to keep the premises in repair, then the lessee is bound to keep them in repair during the whole of the term: (*Luxmore* v. *Robson*, 1 Barn. & Ald. 584.) It will be proper also to provide that the landlord shall have a right of entry upon the demised premises at certain stated periods for the purpose of examining into the state of the repairs; for in the absence of some express stipulation to this effect, a landlord has no right whatever to enter on the demised premises during the continuance of the term for any purposes of this nature (*Barker* v. *Barker*, 3 Car. & Pay. 557); to which should be superadded that the tenant, upon notice from the landlord to that effect, will make all such necessary reparations as the premises may require.

As to covenants against assigning without licence.]—If the lease is to contain a covenant not to assign or underlet without licence, an express stipulation to that effect will be necessary to authorize the lessor to insist upon its insertion in the lease; nor will the purposes for which the property

has been usually let at all vary the law in this respect: (*Henderson* v. *Hay*, 3 Bro. C. C. 632.) It will be requisite, also, to extend the restriction to underletting, as well as assigning; for granting an underlease is no breach of covenant not to assign without licence: (*Roe d. Gregson* v. *Harrison*, 2 T. R. 426.) And if, as is generally the case, a breach of a covenant of this kind is to avoid the term, a stipulation to that effect ought to be inserted; for a breach of covenant in either of the above respects, although it will subject the tenant to an action, will not avoid his estate, as an express proviso for avoiding it under such circumstances would have done: (*Paul* v. *Nurse*, 8 B. & C. 488.) But if, as sometimes happens, the lessor is desirous of substituting a payment by the lessee of some specified sum of money by way of fine instead of a forfeiture of the term, a stipulation to that effect should be inserted in the contract, and a covenant in accordance with such stipulation inserted in the lease: (see the form of a covenant, 1 Con. Prec., Part III., Section II., No. II., clause B., p. 478, *in notis*, 2nd edit.)

Where lessor is to be authorized to determine lease in case of lessee's bankruptcy or insolvency.]—When it is intended that the tenant's estate shall determine in case of his becoming bankrupt or insolvent, an express stipulation for avoiding the estate upon the happening of either of those events will become necessary; for unless expressly provided for, an assignment by operation of law, as where the lease passes to the assignees upon the bankruptcy of the tenant, will be no breach of his covenant not to assign without licence; neither will an assignment to a purchaser of a term from the sheriff under a *bonâ fide* execution constitute any such breach: (*Doe d. Mitchinson* v. *Carter*, 8 T. R. 57.) It may be proper, also, to remark, that depositing a lease with a creditor is no breach of a covenant not to assign without licence, and must consequently be expressly mentioned to have that operation: (*Doe d. Pitt* v. *Laming*, 1 R. & M. 36.)

As to carrying on certain trades.]—If the tenant is only to employ the demised premises in some particular manner, or is to be prohibited from carrying on any particular kind of trade or business thereon, or in anywise to be restricted from exercising the ordinary rights of a tenant over the property, it should be clearly stated what these restrictions are to be. If the prohibition is against carrying on offensive trades, the best plan is to enumerate the particular trades that are not

to be carried on, and to conclude with the words, "or any other noisome or offensive trade or business whatsoever." In this clause it is important to employ the term "business" as well as "trade," as the court will not extend the word trade beyond its true import, but will construe it as applicable only to a dealing in buying and selling; for every business is not a trade, although every trade is a business: (*Doe ex dem. Wetherall* v. *Bird*, 2 Ad. & Ell. 161.)

What will be considered as offensive trades.]—With respect to what will be considered as an offensive or a noisome trade, where none are enumerated, will depend in great measure upon the situation of the property, and, it seems, would not comprehend any such trades as were carried on upon the premises at the time of granting the lease: (*Gutteridge* v. *Maynard*, 1 Moo. & Rob. 334.) So that, if any such trades are intended to be prohibited, an express provision to that effect will become necessary. It has also been held, that converting a dwelling-house into a public-house was no breach of a covenant not to carry on any trade or business that might grow to be offensive or any annoyance or disturbance to any of the tenants of the lessor, or of the neighbourhood, various other trades having been enumerated and prohibited, but that of a licensed victualler not specified: (*Jones* v. *Thorne*, 1 B. & C. 715.) The trade of a coachmaker does not fall within a provision against an offensive trade: (*Bennett* v. *Saddler*, 14 Ves. 526.) Neither, it seems, is a brewhouse necessarily a nuisance (*Gorton* v. *Smart*, 1 Sim. & Stu. 66), although it often proves so. Nor does the carrying on the business of a retail brewer amount to a breach of covenant not to carry on the trade of a common brewer or retailer of beer: (*Simons* v. *Farren*, 1 Bing. N. C. 126.) And in a case where several trades or businesses which were enumerated were not to be carried on, the clause concluding "or any offensive *trade*," a question arising whether using the house as a lunatic asylum was a breach, the court held that it was not, the keeping a lunatic asylum not being a trade; which argument was also still further strengthened by the circumstance that all the trades and businesses there enumerated were conducted by buying and selling, and that if the general word *trade* must be held to introduce any in addition, they at least should be *ejusdem generis* with the former: (*Doe ex dem. Wetherall* v. *Bird*, *supra*.)

Practical suggestions.]—But if the restriction is to be not merely against the exercise of certain trades, but against

carrying on any kind of trade whatever on the premises, the best course seems to be not to attempt to enumerate or specify any kind of trade or business, but to state generally that no kind of trade or business whatever shall be carried on upon the demised premises, which are only intended to be used as a private dwelling-house only: (see the form 1 Con. Prec., Part III., Section II., No. IV., clause B., *in notis*, p. 491, 2nd edit.)

Where an increased rent is reserved in case certain trades or any kind of trade or business is carried on upon the premises.]—Sometimes an increased rent is reserved in case certain trades or any kind of trade or business is carried on upon the demised premises. The object of this clause generally is not to benefit or compensate the landlord by the increased rent, but for the purpose of deterring the tenant from occupying the premises for any of the purposes for which such increased rent is reserved, and whenever this is the landlord's real object, his solicitor should take care that a sufficient amount is reserved to accomplish it; for rents of this kind are not viewed in the light of a penalty, but as the actual amount of damages fixed by the parties as a satisfaction of the breach (*Denton* v. *Richmond*, 1 Cromp. & Mees. 734); and on this account equity will neither grant an injunction to restrain a lessee from violating a covenant of this nature (*Woodward* v. *Giles*, 2 Vern. 119), or release the latter from the payment of the increased rent: (*Birch* v. *Stephenson*, 3 Taunt. 469.)

Leases of dwelling-houses.]—An ordinary agreement of a lease of a dwelling-house should contain a sufficient description to identify the premises intended to be demised, the term for which they are to be let, the amount of rent reserved, and the times at which it is to be paid, by whom the rates, taxes, and other outgoings are to be discharged, and by whom the premises are to be kept in repair: (see forms of this kind, 1 Con. Prec., Part III., Section I., No. I., p. 429, 2nd edit.; *ib.* No. II., p. 435; *ib.* No. III., p. 445.)

Where a lease is to be granted of a furnished house.]—Where furniture is to be let with the house, in addition to the stipulations we have already mentioned, it will be proper to make some stipulation as to supplying breakages, losses, and damage to the furniture, and also to provide that the tenant is not to be permitted to employ the furniture on any

other place than on the demised premises: (see the form 1 Con. Prec., Part III., Section I., No. V., clause 5, p. 452, 2nd edit.) In addition to this, it may also be prudent to stipulate that the lease of the furniture shall become determinable in case such furniture shall be taken in execution of any process against the goods of the lessee, as, in the absence of some provision of this kind, the landlord has no means, during the continuance of the term, of recovering any articles of the demised furniture in case they shall be taken in execution for the tenant's debt: (*Ward* v. *Macaulay*, 4 T. R. 489; *Gordon* v. *Harper*, 7 T. R. 9.) Nor, it seems, has the landlord any remedy against the lessee until the term has expired, unless some express stipulation or covenant to that effect be inserted in the lease. But where the lease is made determinable upon the lessee's removing and allowing such articles of furniture to be used elsewhere than on the demised premises, or in case of their being taken in execution, then the landlord will be entitled to determine the lease, and also to maintain trover for the recovery of his furniture: (*Berry* v. *Heard*, Cro. Car. 327; *Smith* v. *Miller*, 7 T. R. 475.)

Leases of public houses.]—If the lease to be granted is of a public-house, and the lessee is to be restricted to take his beer, wine, or spirits of the lessor, a stipulation to that effect will be necessary; for however common a practice it may be for brewers or vintners who grant leases of public-houses to require a covenant from the lessees to the above effect, they have no right whatever to insist upon its insertion where the agreement is only for granting a lease under the common and usual covenants, or unless it contains some stipulation or provision that the lease is to contain a clause or covenant to the above effect: (see the form 1 Con. Prec., Part III., Section II., No. V., clause B., *in notis*, p. 495, 2nd edit.)

Where the lease is to contain covenants for renewal.]—If the intended lease is to contain any covenant for renewal, the contract ought to be very explicit in this respect, and this will require the particular attention of the lessee's solicitor; the more particularly so, as covenants for renewal are construed strictly, and always more in favour of the lessor than of the lessee (*Baynham* v. *Guy's Hospital*, 3 Ves. 395; *Moore* v. *Foley*, 6 *ib.* 232); and hence, a covenant to renew a lease under the same covenants as were contained in the original lease, has been held satisfied by tender of a lease for the same term, at the like rent, and containing all the cove-

nants, except the covenant for renewal (*Iggulden* v. *May*, 7 East, 237); and the rule in this respect is the same in courts of equity as in courts of law: (*Higgins* v. *Rose*, 3 Bligh, 113.) If, therefore, the proposed lease is intended to contain a perpetual right of renewal, or any right to more than one single renewal, the contract should stipulate for those rights, which, whatever they are to be, should be distinctly defined (see a form of this kind, 1 Con. Prec., Part III., Section II., No. V., clause C., *in notis*, p. 499); and where the right of renewal is to be restricted, the extent of such restriction ought to be set out with equal clearness: (see the form of a proviso of the latter kind, *ib.*, clause D., p. 500.)

Terms for letting a farm.]—The terms for letting a farm should be plain and explicit, and after setting out the parcels, the term to be granted, the amount of rent and time of payment, and the stipulations as to the payment of rates and taxes and repairs, should state particularly as to the mode in which the farm is to be cultivated by the tenant; and every act the latter is intended to covenant to perform, or abstain from doing, should be set down in the contract, with the terms or conditions under which the premises are to be taken, and the lessor should never rely on being able to insist upon having any clause or covenant inserted in the lease upon which the conditions or agreement for letting are silent, on account of such clause or covenant being usually inserted in the husbandry leases of that county or neighbourhood: (see the form of terms for letting a farm, 1 Con Prec., Part III., Section I., No. IV., pp. 448, 450, 2nd edit.)

Building leases.]—When a building lease is to be granted, every particular that is to be included in the lease should be specified in the agreement or terms upon which the lease is to be granted; otherwise, when the lease comes to be actually prepared, neither party will have a right to insist upon having any matter or thing inserted therein that the agreement is altogether silent upon, and that is not applicable to any lease of the kind granted under ordinary circumstances.

Distinction between leases and agreements for leases.]—It is a common practice to insert at the end of the instrument that it is intended to operate as an agreement for a lease only, and not as an actual lease. But this clause is far less important now than it was formerly, when questions were

continually arising as to whether written instruments relating to the letting of property were actual leases or mere agreements for leases, but which are now chiefly confined to instruments made previously to the statute 8 & 9 Vict. c. 106, by which it is enacted that a lease *required by law to be in writing* of any tenements or hereditaments made after the first day of October, 1845, shall be void at law, unless made by deed (sect. 3); still this will not prevent an instrument, although under seal, from being construed as an agreement where, from the terms in which it is expressed, it is evident the parties intended it should have that operation: (1 Hughes Pract. Sales, pp. 510, 511, 2nd edit.) It must also be kept in view that the above-mentioned enactment only mentions such leases as are *required by law to be in writing*, and does not affect such leases as by the second section of the Statute of Frauds were excepted out of the operation of the first section; viz., parol leases not exceeding three years from the making thereof, whereupon the rent reserved to the landlord shall amount to two-thirds of the value.

Formerly a common practice to rely upon a mere agreement only.]—It was not an uncommon practice formerly to rely merely upon the agreement for a lease expressing the terms upon which the property is to be held, either with or without a special agreement to execute a lease when called upon. This was chiefly done to evade the heavy amount of stamp duty which, until lately, was charged upon leases; but these duties having been considerably reduced by the act 13 & 14 Vict. c. 97, the practice of relying upon a simple agreement will daily become less frequent; nor is it one which ought often to be followed, as a lease has so decided an advantage over a mere agreement, as well in favour of the landlord as of the tenant. Under a mere agreement for a lease, the tenant having no legal estate, the landlord may eject him whenever he pleases by an action at law (*Hamerton* v. *Stead*, 5 B. & C. 478); whilst, on the other hand, the landlord, unless rent has been previously paid to him under such agreement, has no power of distress for rent subsequently becoming due to him (*Mann* v. *Lovejoy*, 1 Ry. & Moo. 355), his only remedy being by action for use and occupation: (*Hegan* v. *Jackson*, 2 Taunt. 148; *Reynart* v. *Porter*, 7 *ib*. 451.)

III. As to Copyholds.

If the property consists of lands of copyhold tenure, the lessee, before he accepts a lease, must take care to see that his lessor has procured a proper licence to demise from the lord of the manor of which the lands are holden; for, in the absence of a special custom, a copyholder cannot lease his lands for more than one year without the lord's licence, and any lease made by him exceeding that period will cause a forfeiture of his estate: (*Fenny ex dem. Eastham* v. *Child*, 2 Mau. & Selw. 255.) This licence must be granted by the lord himself, the steward, in the absence of a special custom, having no authority to confer a power of this nature: (Gilb. Ten. 333.) Nor can the lord himself confer a licence for a longer period than is commensurate with his own estate in the lands; consequently, a licence granted by a tenant for life will determine with his life estate: (*Munifus* v. *Baker*, 1 Keb. 25); but although such licence will be void as against the reversioners, yet, having been granted under the authority of the tenant for life, it will not entitle the former to enter upon the copyhold for a forfeiture (*ib.*): (see the form of licence to demise, 1 Con. Prec., Part III., No. VII., p. 460, 2nd edit.)

How licence may be obtained when the lord or lady of a manor are under legal disabilities.]—But although, generally speaking, none but the lord himself can grant a licence to demise, still, where any lord or lady of a manor is labouring under any legal disabilities, such as being a minor, idiot, lunatic, or feme covert, or beyond seas, the guardian, committee, husband, or attorney, as the case may be, of such lord or lady (but in case of a feme covert, not being a minor, idiot, or lunatic, or beyond the seas, with her consent in writing), may execute the instrument by which such consent is to be testified, in testimony of the consent of such lord or lady, which is to be deemed an execution by the lord or lady: (5 & 6 Vict. c. 108, s. 24.)

Lord cannot be compelled to grant a licence.]—The lord cannot be compelled to grant a licence to demise (*Reg.* v. *Hale*, 9 Ad. & Ell. 339) unless he has entered into an actual agreement to that effect; but in the latter case, equity would undoubtedly enforce a specific performance of such agreement: (*Hungerford* v. *Austen*, Nels. 49.)

Custom sometimes authorizes granting leases without a licence.]—In some manors, the custom authorizes the grant-

ing of leases without licence for a longer period than a year, sometimes, indeed, for so long a period as a life, and forty years over: (*Anon.* Moo. 8, pl. 27; 1 Platt, Leases, 110.) In the manor of Highbury, in Middlesex, the custom warrants the granting of a lease for any term not exceeding twenty-one years (*Rawsthorne* v. *Bentley*. 4 Bro. C. C. 415): and in the manors of Stepney and Hackney, in the same county, the copyholders are authorized to grant leases without licence for any term not exceeding twenty-one years and four months in possession, so that such leases be presented to the homage, and entered on the court rolls at the first or second general court after the making thereof: (Scriv. Cop. 544, 3rd edit.)

Lease without licence for more than one year, in the absence of some custom warranting it, will work a forfeiture.]—But in the absence of some custom, a lease without licence for more than one year, and in some manors even a lease for that short period, without the lord's licence (1 Prest. Abs. 202), will work a forfeiture of the estate; and it must be remembered that a forfeiture of this kind is one which a court of equity will refuse to relieve against.

Plans that have been resorted to in order to avoid a forfeiture.]—To evade the required licence without incurring a forfeiture has caused various devices to be resorted to. In one instance, a copyholder strove to attain this object by granting a lease for a year, excepting the last day, and so from year to year, excepting the last day of every year, as long as he lived; but all, it seems, he procured by his artifice, was the forfeiture of his estate; for it was held that it was a certain lease for two years with the exception of two days, and therefore, in effect, a lease for more than a year, Williams, J., at the same time quaintly observing that the lessor had made a snare for another, and had catched himself in the same: (*Lutterell* v. *Westorn*, 1 Bulstr. 215.) In another case, also, a copyholder made on the same day three distinct leases, leaving an interval of two days between the termination of the one and the commencement of the next succeeding lease, but this was considered a mere fraudulent attempt to evade the law, and therefore caused a forfeiture of the copyhold: (*Mathews* v. *Whetton*, Cro. Car. 233.) And it has also been decided that if, under a custom to lease for three years, a copyholder leases for three years, and so from three years to three years, for nine years, it will work a forfeiture, for it is a lease for six years at the least: (*Wilcock's case*, 2 Danv. Abr. pl. 2.)

To effect a forfeiture there must be an actual demise.]—Still, in order to work a forfeiture, the instrument must operate as an actual demise, and not rest merely upon contract or covenant; consequently, if a copyholder, who, by the custom of the manor, is authorized to lease for a year without licence, grants a lease for that period, and covenants that the lessee shall enjoy the lands from year to year for the term of seven, ten, or any other specified number of years, this will not create any forfeiture, because the lease itself is only for one year, and the covenant for quiet enjoyment for the whole period beyond that time will not convert it into a lease, particularly where adopting such a construction would effect a forfeiture of the estate: (*Fenny d. Eastham* v. *Child*, 2 Mau. & Selw. 255.) And even where the actual demise exceeds a year, still, if it be qualified with a proviso that the lord shall give his licence and consent to the same, and so that the same shall not become forfeit, the excess will not be construed as an actual demise, for the obtaining the lord's licence will be considered as a condition precedent to the grant of the further estate (*Luffkin* v. *Nunn*, 1 New Rep. 163; S. C., *sub nom. Doe d. Nunn* v. *Luffkin*, 4 East, 221): (see the form of a proviso of this kind, 1 Con. Prec., Part III., Section I., No. VI., clause 6, p. 458, 2nd edit.)

Practical directions for penning an agreement for demising copyholds.]—In the usual form of an agreement for letting copyholds, the lessor first agrees to demise the premises for the term agreed upon, if he can obtain the lord's licence to grant the lease, which he undertakes to use his utmost endeavours to procure; it then stipulates by whom the rates, taxes, and other outgoings are to be discharged, and also contains the usual stipulations with respect to repairs as in ordinary agreements for leases, in addition to which there is a stipulation that the lessee will not do any act to incur a forfeiture; the lessor stipulating to enter into a covenant for quiet enjoyment, and to indemnify the lessee against all rents, heriots, suits, services, &c. in respect of the copyhold premises, concluding with a proviso that if the lessor is unable to procure the licence to demise, the instrument shall be void as far as regards letting the premises for the term therein mentioned, and be construed as a demise for one year only, and as an agreement that the lessee shall enjoy the premises from year to year until the expiration of the term thereinbefore agreed to be granted: (see the form 1 Con. Prec., Part III., Section I., No. VI., pp. 454, 459, 2nd edit.)

Practical suggestions.]—No lessee, however, under a copyholder should rest satisfied with a mere agreement in the form above suggested, but should insist on having it carried out by an actual lease under the sanction of a licence from the lord, unless, indeed, in a case where the lessee is anxious to occupy the premises, and the lord cannot be induced to make such grant; for if a copyhold tenant grants a lease with the licence of the lord, and afterwards commits a forfeiture, the lease still remains good, and the tenant may set it up in his defence to an action of ejectment (*Clarke* v. *Arden*, 25 L. T. Rep. 83), which he could not do if he held under a mere agreement, however skilfully such agreement may be penned.

Memorandum of grant of licence should be entered forthwith on court rolls.]—As soon as the lord's licence is obtained, a memorandum of such grant should be entered on the court rolls; care also must be taken that the terms of such licence are strictly complied with; for under a licence to lease from a day past, a copyholder cannot make a lease to commence from a future day (*Jackson* v. *Neal*, Cro. Eliz. 395); and although he may grant a lease for a shorter period than is specified in the licence (*Worledge* v. *Banbury*, Cro. Jac. 436), he must in nowise exceed it; and wherever a condition precedent is annexed to such licence, the performance of the condition is essential to the validity of the grant (*Hall* v. *Arrowsmith*, Poph. 106), but a condition subsequent has a different operation: (*ib.*)

Licence when exercised becomes exhausted.]—It must also be remembered that as soon as the licence is exercised it becomes exhausted, so that a fresh licence becomes necessary upon every fresh demise (*Anon.* Moo. 114, pl. 329; Gilb. Ten. 219); but no new licence will become necessary upon any assignment or underlease which the lessee may make of the demised premises: (*Johnson* v. *Smart*, 1 Roll. Abr. 508, pl. 14.)

CHAPTER II.

LEASES.

I. INVESTIGATION OF TITLE.

In all cases where the lessor's title is to be produced, an abstract of such title must be furnished by his solicitor at the lessor's expense, and the same routine of investigating and perfecting the title, and all other matters connected therewith, must be gone through, as in the instance of an absolute sale of the property: (as to which see vol. i.)

II. BY WHOM AND AT WHOSE EXPENSE THE LEASE IS TO BE PREPARED.

As to the lease.]—It is the usual custom for the lease to be prepared by the lessor's solicitor, at the expense of the

lessee (*Ex parte Prickett*, 3 Swanst. 130); still, for want of privity between the lessee and the lessor's solicitor, the latter, in the absence of some particular agreement to that effect, will be unable to support any claim for such costs against the lessee (*Pratt* v. *Nizard*, 5 B. & Ad. 808), his proper remedy being against the lessor, who, although liable in the first instance, will be entitled to recover the amount against the lessee: (*ib.*) But if the agreement for the lease should stipulate that the lease is to be prepared by the lessor's solicitor at the lessee's expense, then, it seems, the lessee will become immediately liable to the lessor's solicitor (*Webb* v. *Rhodes*, 3 Bing. N. C. 372; 3 Hodg. 138); whilst, on the other hand, if the agreement stipulates that the lease shall be prepared at the sole expense of the lessor, if required by either of them without further contest, it will then become incumbent on the lessor to prepare it also; so that, under the latter circumstances, it will not be requisite for the intended lessee to tender any lease for execution previous to the commencement of an action for a breach of this agreement: (*Price* v. *Williams*, 1 Mees. & Wels. 6.)

Counterpart.]—In the absence of any agreement or stipulation to the contrary, a lessor requiring a counterpart of a lease must defray the costs of preparing it: (*Jennings* v. *Major*, 8 Car. & Pay. 61; 2 Platt on Leases, 540.)

Object of lease and counterpart may both be contained in the same instrument.]—Whenever the saving of expense is an important object, the lease may be executed by the lessor and lessee, and will then become as binding upon both, as if they had each of them executed separate instruments of lease and counterpart. The chief objection to this course of proceeding is the difficulty that necessarily arises respecting the custody of the instrument; but this is often remedied by allowing it to remain in the custody of some third person appointed by lessor and lessee on behalf of both of them.

Advantages of lessee only executing the counterpart.]—Whenever there are distinct instruments of lease and counterpart, the latter should be executed by the lessee only. The advantage of this is, that it supersedes the necessity of the lessor's giving evidence of the execution of the original in an action against the lessee, which he is bound to do where the part in his possession is executed by them both: (*Doe d. Wright* v. *Smith*, 8 Ad. & Ell. 255.)

III. Premises of the Lease.

1. *Parties.*

Parties to lease, how to be described.]—The parties to an indenture of lease should be designated by their Christian and surnames, places of abode, and title, profession, occupation or trade, in the same manner as in an ordinary deed of conveyance: (as to which see *ante*, vol. i., p. 198, *et seq.*) If the lease is executed by attorney, the name of the principal, and not of the attorney, should be inserted as the demising party, and the delivery should be made as the act and deed of the principal.

Where the intended lessor dies pending the contract.]—In case the intended lessor should die pending the contract, his real or personal representatives, according to the estate the deceased took in the premises, must be the granting parties, in the same manner as if the lease had been an absolute conveyance or assignment of the property: (as to which see *ante*, pp. 201, 203.)

Where the intended lessee dies pending the contract.]—If the intended lessee dies pending the contract, the lease must, in case he has made no specified bequest of the interest he took under the contract, be made to his executors or administrators; but if the premises are specifically bequeathed, the grant may then, by the assent of the intended lessee's personal representatives, be made directly to the legatee; still, as the assent of the personal representatives is essential to vest the subject-matter of the bequest absolutely in the legatee, it will be the better plan to make them concurring parties to the lease, so far as to acknowledge that the demise to the legatee was made with their assent and approval, and the demise may then be made to the latter accordingly. All the executors need not concur, but in the case of administrators, every one of them ought to be assenting parties: (see the reason for this distinction, *ante*, vol. i., p. 203.

2. *Recitals.*

Recitals, when usually employed in leases.]—Recitals are rarely inserted in leases, unless where they are granted in

pursuance of a leasing power, or the peculiar title of the lessor, such as himself being but a lessee, or a tenant for life or in tail, or a husband seised in right of his wife, or a mortgagee, or so forth, renders it expedient to show the estate he himself takes in the lands, or the authority under which he is enabled to grant the term, or with a view of pointing out the collateral determination to which the lessee's estate may be exposed. But these recitals may be, and usually are, very briefly penned, and are often inserted at the end of the description of the parcels, in the manner we have pointed out in a preceding part of the present work (*ante*, vol. i., p. 208); and even where the lease is granted in pursuance of a power, the instrument creating such power is often only briefly mentioned or referred to in the clause of demise, as, that the lessor, "in exercise of a power limited to him by a certain indenture, &c. dated, &c. (*setting out the date and names of parties*), DOTH by this present deed appoint, and also grant and demise," &c.

3. *Testatum, Granting Clause, Parcels, and General Words.*

Testatum clause.]—The consideration, whatever it may be, must be truly set forth, and therefore, if any pecuniary consideration is paid either by way of fine or otherwise, the exact amount should be stated in words at length, in the same manner as in a conveyance to a purchaser, as the like penalties will be incurred by an omission or misstatement of the true consideration as if it had occurred in a purchase deed, although the instrument itself will not be invalidated as a lease thereby (*Duck* v. *Braddyll*, 13 Pri. 45) any more than a conveyance would have been under similar circumstances.

Operative words.]—The usual operative words are, "grant, demise, lease, set, and to farm let;" but in most modern leases, the words "grant, demise, and lease," or "grant and demise" only, are the expressions most commonly employed; still, any of the other terms will be of equal force, and in fact no particular form of words is necessary.

Words of limitation not essential.]—It is not necessary, though a common practice, to annex any words of limitation to the demise: (as to which see *ante*, p. 360.)

Where the lease is granted by tenant for life and reversioner, or by mortgagor and mortgagee.]—If the lease is

granted by tenant for life and reversioner, the tenant for life should "grant and demise," and the reversioner should "ratify and confirm:" (see the form 1 Con. Prec., Part III., Section II., No. XIV., clause 4, p. 525, 2nd edit.) In like manner, if mortgagee and mortgagor concur in a lease of the mortgaged premises, the mortgagee, having the legal estate, must "*demise*," and the mortgagor must "*confirm*:" (see the form 1 Con. Prec., Part III., Section II., No. IX., clause 4, p. 511.)

Leases by husband and wife of the wife's lands.]—If the lease is granted by husband and wife of the wife's lands under the provision of the statute (32 Hen. 8, c. 28) by which husbands seised in right of their wives are empowered to make leases, the husband and wife should jointly demise (see the form 1 Con. Prec., Part III., Section II., No. XII., clause 3, p. 519, 2nd edit.); and this is absolutely necessary where the wife is solely seised; but if the husband and wife are jointly seised, then it seems that the wife need not necessarily be made a demising party: (Butl. Co. Litt. 44 a, n.)

Leases granted by a dean and chapter.]—When the lease is granted by a dean and chapter, the demise is made by such dean and chapter with their common consent or assent, thereby for themselves and their successors: (see the form 1 Con. Prec., Part III., Section II., No. XVIII., clause 2, p. 550, 2nd edit.)

Parcels.]—The parcels are usually set out at length in the granting clause, but sometimes, where the demise is by way of underlease they are described in the recital of the original lease, and only referred to in the clause by which they are actually demised. If described in the recitals, the description ought to correspond verbatim or nearly so with that contained in the recited lease; and in like manner, when premises have been frequently let, without alteration, the description is generally a mere transcript of what has been contained in the former leases.

Where the property has gone through alterations.]—But where the property has undergone any material alteration; as by the pulling down of hedges, or boundaries, the conversion of meadow into arable land, or *vice versâ*, whereby the landmarks are removed, or the identity of the property

in anywise changed, the description must be varied to correspond with all these alterations, to do which effectually the best plan appears to be to particularize the parcels as well by their ancient as by their modern description, which may be done either by using the ancient description first, with the addition of "All which said premises, &c." or by inserting the modern description first, and then adding "All which said premises were formerly known by the description following (that is to say)," and then inserting the exact ancient description: (see 2 Platt on Leases, 25.)

Buildings and other improvements pass under a description of the land on which they have been erected.]—Buildings or other improvements upon the demised premises, as they become part of the land itself, do not require any particular terms to pass them, and therefore, if a plot of ground had previously been demised by that description, upon which a dwelling-house is afterwards built, the latter will pass with the plot of ground under that original description; still, whenever buildings, or other lasting improvements, have been made upon the property, it is usual to specify or describe them in the parcels in any future lease which is granted of the property; as for example, "All that plot, piece, or parcel of land or ground, *together with the messuage or dwelling-house lately erected thereon*," *&c.*

What will pass under a demise of a house or messuage.]—By the simple demise of a house, however, a garden annexed to it will also pass, as it is considered to be part of the house. And by a demise of a messuage, "together with a garden and house of office at the further end thereof," passes the use of all the garden, and not only the use to pass to the house of office; and therefore the lessor cannot build on any part of the garden: (*Kidder* v. *West*, 3 Lev. 167.)

As to agricultural leases.]—In leases of farms it is often important to have a map or plan of the estate, showing what part of the demised premises is to be considered as meadow, and what as arable, in order to prevent any future misunderstandings upon the subject. This is particularly necessary when the lessee is to be restricted from ploughing up old meadow land; for although in the absence of any precise stipulation to that effect, a tenant would render himself liable for waste for ploughing up and converting wood or meadow into arable land, not only on the ground of varying the course of husbandry, but also because it changes the

identity of the property (Dy. 37 a.; Co. Litt. 53 b.), this will not prevent him from showing that the land although described as meadow, was actually arable, or *vice versâ* *Birch* v. *Stevenson*, 3 Taunt. 469); but if it be expressly stated that the premises described in the map annexed to the lease are to be considered as arable or meadow according to the particular colours representing them in such map, it will settle the question beyond all possibility of doubt: (see the form 1 Con. Prec., Part III., Section II., No. XV., clause D., *in notis*, p. 532, 2nd edit.)

General words.]—General words, such as "all houses, outhouses, edifices, buildings, ways," &c. are sometimes used for the purpose of supplying any omissions which may have occurred in the description of the parcels; still, this by no means dispenses with the necessity of having a full, clear, and accurate description of the premises set forth in the deed, with all the rights and privileges the lessee is to enjoy therewith; and although the act (8 & 9 Vict. c. 124) declares "that every lease *made in pursuance of its provisions*, unless any exception be specially made therein, shall be held and construed to include "all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, watercourses, liberties, privileges, easements, profits, commodities, emoluments, *hereditaments* and appurtenances whatsoever to the lands and tenements therein comprised, belonging or in anywise appertaining (sect. 2); still, as this construction is only to be adopted where the lease is made in pursuance of the provisions of this act, it can never be relied upon in practice; for it seems that unless the provisions of the act are strictly complied with, it can have no operation upon the instrument.

Practical suggestions.]—And whenever any kind of easement is intended to be granted arising out of premises which do not form part of the demised property; as the use of a pump on adjoining premises, either solely, or jointly in common with other persons, there ought to be a special grant of such right, the exercise of which should be expressly granted to endure during the whole term of the lease, otherwise, it seems at least doubtful whether the lessee would have any remedy against the lessor, in case the latter should remove the pump before the expiration of the term, as he certainly would not if the grant expressed the use of the pump to be during its continuance on the premises, notwithstanding the lessee is to bear a moiety of

the charges of the repairs: (*Rhodes* v. *Bullard*, 7 East, 116; see also *Pomfret* v. *Ricroft*, 1 Saund. 321.) So where a right of way is designed to pass, which is not strictly appurtenant to the demised premises, it will be proper to make an express grant of such way; for it has been held that a right of way not strictly appurtenant, will not pass under the general words, "all ways, roads, rights of roads, paths, passages, &c., to the premises belonging or in anywise *appertaining*," unless the parties appear to have intended to use those words in a sense larger than their ordinary legal import (*Hinchcliffe* v. *Earl of Kinnoul*, 5 Bing N. C. 1), and hence has sprung up the practice in modern leases of adding at the end of the clause, the expressions "or usually used or enjoyed therewith," which it seems would be sufficient to pass a right of way used at the time of the lease with any part of the demised premises (*Harding* v. *Wilson*, 2 Barn. & Cres. 96, 100.) The particular mode in which such right of way is to be exercised ought also to be distinctly stated; as for horses, carts, carriages and so forth, as also the lands over which it is to pass, and where it is to commence and terminate: (see the form 1 Con. Prec., Part III., Section II., No. XV., clause B., *in notis*, p. 529, 2nd edit.)

Import of the word "appurtenances."]—The word "appurtenances" has a very comprehensive signification; for it will pass turbary granted to a house, a sheep walk, a curtilage, and a garden; and it seems that lands which are usually let with a house for the same rent will pass under the same word: (Cary, 24.)

Construction of the terms "belonging or appertaining."]—The terms "belonging or appertaining" are usually coupled together, but sometimes, where brevity is desirable, one only of these words is employed, for either term is construed to have the same operation: (*Barlow* v. *Rhodes*, *sup.*) Still, it apears that neither of those terms will be sufficient to cover what once formed a part of, but has since been severed from, the demised premises; as where a room formerly occupied with a dwelling-house, with which it communicated by means of a door, but which communication is afterwards stopped up by a wooden partition, which has been held not to pass under a demise "of a messuage with all the rooms and chambers with the appurtenances belonging or in anywise appertaining thereto," to remedy which it will be prudent to add to the above clause, or "now or at any time heretofore demised, used, occupied, or enjoyed therewith."

Fixtures.]—If any fixtures are intended to be included in the demise, they ought to be distinctly specified; but the best way of doing this is by a schedule at the end of the deed, and shortly describing or referring to them in the body of the deed itself, as "the fixtures specified and set forth in the schedule hereunto annexed."

Reversion clause.]—In leases for long terms of years it was a common practice to insert the reversion clause (2 Prest. Con. 178); but as this clause is superfluous, and is therefore now very often properly omitted in purchase deeds, it is still more out of place in a lease, however long the term may be, and ought therefore to be omitted in that instrument also.

All-estate clause.]—The all-estate clause should of course be omitted, as being inconsistent with the interest which the lessee is to take in the premises (as to which see *ante*, vol. i., p. 221.)

All-deeds clause.]—The all-deeds clause must of course be left out in every lease; as the title deeds will always remain in the lessor's custody; and although he may undertake to show his title whenever the lessee may require it, this will in nowise entitle the latter to the custody of the deeds.

4. *Of the Exceptions and Reservations.*

Essentials to the validity of an exception or reservation.]—Some attention will be required in framing any exceptions and reservations which may be required in the lease, which, as we have before had occasion to remark, whenever any doubt arises upon their construction, are construed in the lessee's favour, and will under no circumstances whatever be construed so as to frustrate the grant (*Dorril* v. *Collins*, Cro. Eliz. 6; *Mabie's case*, Winch. 23), as where a lease was granted of a rectory, except the glebe, which exception was holden bad altogether; although a lease of this kind, with the exception of parcel of the glebe, would have been good: (*ib.*) The exception must also be of a part of the thing demised under a general denomination, as a farm called A., except a certain field or close thereout; for an èxception cannot be of that which is itself expressly granted; as for example, a demise of the farms A. and B., excepting B.; or of certain lands and underwoods thereunto belonging, excepting the underwoods, or twenty acres of land, excepting ten

acres, or one acre, or a house and shop, excepting the shop, in every one of which cases the exception will be void.

Duties of solicitors both of lessor and lessee with respect to reservations and exceptions.]—The lessor's solicitor ought always to come to some previous arrangement with the lessee respecting all reservations and exceptions which the lessor is to retain, which ought at once to be reduced into writing and form part of the contract, and thus avoid the discussion of any of these matters when the lease itself comes to be actually prepared, any further than relates to such reservations or exceptions being inserted therein, in accordance with the terms of such previous arrangement. The lessee's solicitor also should be equally careful to see that his client is in nowise prejudiced by the insertion of more extended reservations or exceptions in the lessor's favour in the lease, than are warranted by the contract or terms previously agreed upon between the parties.

Usual reservations contained in leases.]—The usual reservations or exceptions in leases are right of way, the right of sporting, and the reservation of timber or minerals growing or produced upon the estate.

As to rights of way.]—If a right of way is to be reserved to the lessor, the whole extent of right which he is to exercise must be as distinctly set forth as upon an express grant of such right, as a more extended right will not be reserved in the one case, than would be conferred in the other.

Trees, woods, and underwoods.]—By an exception of the underwoods and coppices, whether in plantations or in hedges, the soil itself, as well as the underwoods, will be excepted out of the demise, so that if the underwoods be cut down or grubbed up during the term, it will confer no right to the lessee to enter upon the lands upon which they grew. But if timber trees be excepted, the latter exception will operate on so much of the soil only as may be necessary for their nourishment and support, and if the lessor cuts down the trees, the land on which they grew will then become the property of the lessee. It is usual in exceptions of the latter kind to reserve a right of entry in the lessor for the purpose of cutting down and carrying off the trees; still this is not actually necessary, as the lessor, under such a reservation, may justify an entry for these purposes, upon the principle that the effect of an exception is to except all things

dependent on and necessary for its enjoyment: (*Durham and Sunderland Railway Company* v. *Walker*, 2 Gale & Dav. 326.) The better and more regular course, however, is to reserve the right of entry, and at the same time to stipulate that the lessor will make reasonable compensation to the lessee for all damage done to the lands in exercise of such right, the amount of which, if disputed, is to be settled by the award of two arbitrators or their umpire in the usual manner: (see the form 1 Con. Prec., Part III., Section II., No. XV., clause 4, p. 530, 2nd edit.) An exception of great trees will not only embrace such trees as are actually great, but also all such as are likely to become so during the continuance of the lease: (*Gamock* v. *Cliff*, 1 Leon. 61.)

As to underwoods.]—But in the case of the exception of underwoods, if the lands themselves on which such underwoods grow are intended also to be excepted to the lessor, the reservation of a right of entry would be repugnant to the exception, and should therefore be omitted; for if inserted, it would negative the lessor's right to retain the soil, and in that case no right of entry would be needed, and the right to the soil would pass to the lessee: (*Pincomb* v. *Thomas*, Cro. Jac. 524.)

Where fruit trees are not intended to be excepted.]—In a reservation of trees, if fruit trees are not intended to be included therein, an exception to that effect should be inserted in favour of the lessee: (see the form 1 Con. Prec., Part III., Section II., No. XV., clause 4, p. 530, 2nd edit.); for although, in some counties, as in Devonshire for instance, where a considerable portion of every farm consists of orchards, a general exception of trees of every kind would not include apple trees (*Wyndham* v. *Way*, 4 Taunt. 316), a different rule of construction might prevail in other parts of the kingdom where orchards may neither be so common or extensive, and the fruit trees, however valuable, do not cover any considerable portion of the demised premises.

As to mines and minerals.]—In excepting mines and minerals it will be proper not only to except mines, minerals, and metallic substances, but also pits of stone, slate, gravel and marl, and also reserve a right of entry in the lessor for the purpose of effectually working the same.

As to rights of sporting.]—In this reservation, unless it is intended, as is rarely the case, that the privilege is to be a

mere personal one to the lessor himself, it ought to be extended to persons in his company or by his permission (see the form 1 Con. Prec., Part III., Section II., No. XV., clause 5, p. 531, 2nd edit.); and the lease should contain a covenant from the lessee authorizing the lessor to give notice to the persons sporting on the premises in the lessee's name, and also to bring actions in his name against such trespassers, the lessor indemnifying him from all costs thereby incurred: (see the form 1 Con. Prec., Part III., Section II., No. XV., clauses N. and O. *in notis*, p. 537, 2nd edit.)

Right of entry for the purpose of inspecting repairs.]—A right of entry for the purpose of viewing the condition of the repairs, or the state of cultivation of the demised premises, is often inserted in husbandry leases (see the form 1 Con. Prec., Part III., Section II., No. XV., clause 6, p. 531, 2nd edit.); but in leases of dwelling-houses, it is a more common practice for the lessee to covenant that it shall be lawful for the lessor to enter on the demised premises for that purpose at certain stated periods, and that if he finds any want of repairs the lessee will amend the same upon notice.

IV. Habendum.

1. Certainty of commencement.
2. Certainty of duration.
3. Certainty of termination.

As it is the office of the habendum to limit the estate which the lessee takes in the demised premises, the term for which they are granted should be defined with precision, it being essential to its validity that it should have a certain commencement, a certain duration, and a certain determination: (*Foote* v. *Berkeley*, 1 Ventr. 83.)

1. *Certainty of Commencement.*

What will be considered a sufficient certainty of commencement.]—The term must be certain at its commencement, yet it may begin from a day past, present, or to come. It may also be made to commence in interest and enjoyment at some future day, though running in computation of time from a past or present day; as from Lady Day next to be computed either from the preceding Christmas Day, or any other preceding day, or from the day of the date of the lease: (*Enys* v. *Donnithorne*, 2 Bur. 1190.) Neither is it necessary that the certainty of its commencement should be ascertained

at the time of the execution of the lease, if in due course of time a day will arrive which will mark such certainty (Orl. Bridg. edit. Bann. 4); as for example, where a lease is granted for a term of twenty-one years, after the death of a life in being, or even after the decease of the lessor himself: (*Child* v. *Baylie*, Cro. Jac. 459.)

Term may be made dependant on any possible event.]—The commencement of the term may also be made dependant upon any possible event, or on a condition precedent (*Potkin's case*, 14 Hen. 8, 10 [B.] 6), as for instance, that A. on payment of some specified sum of money, or the performance of some certain act, shall from thenceforth enjoy the lands for some specified term of years, in which case A., on performing the condition, will have a lease for the term thereby expressed to be granted: (Shep. Touch. 273; Co. Litt. 456; 1 Roll. Abr. 848.)

Whether a term limited to commence from the date of the lease will pass a present or a future interest.]—It was at one time doubtful whether an habendum, "*from the date*" of the deed, or "from henceforth," would pass a present, or a future interest, which became a very important question where the lease was granted in exercise of a power which only warranted the granting of leases to commence in possession, in which case a term limited to commence *in futuro* would have been ineffectual, on account of being unwarranted by the power. To guard against this consequence, a practice prevailed of limiting the term not from the "*day of the date*," but "*from the day next before the day of the date*." But it has been some time since decided that "*from the date*," will be construed inclusive or exclusive of the date, as will best affect the deed, and not destroy it (*Pugh* v. *Duke of Leeds*, Gow. 714); so that in modern practice, where a possessory lease is intended to be granted, the term is generally limited to commence from the day of the date, and not from the day preceding the day of the date.

As to concurrent leases.]—If, during the continuance of a lease, a second lease is granted of the same premises for a longer term, it becomes concurrent with the existing lease in point of interest and computation of time, and operates as an immediate lease of the reversion (2 Platt on Leases 57), which will in general pass the right to the rent under the former lease (*ibid.*), without the necessity of any attornment from the tenants, which formal act, if it was ever necessary,

has long since been dispensed with by the statute 4 & 5 Anne, c. 16, s. 9.

Where the term is to commence in futuro without reference to any former lease.]—If the term is made to commence at some future day without reference to any pre-existing lease, it will then be reversionary, and confer no greater interest on the grantee than an *interesse termini*, until the day appointed from the commencement of the term actually arrives. So, a term which is to commence after the expiration or sooner determination of one existing, will be a lease in reversion: (*Dean and Chapter of Westminster's case*, Carth. 14.)

2. *Certainty of Duration.*

Notwithstanding the duration of the term must be certain, it is not necessary that such certainty should be limited in express terms only; as for example, to A. for a term of seven, fourteen, twenty-one, or any other number of years; for it may be defined by reference to some other certainty by which the duration of the term is to be ascertained; for if it has reference to an express certainty it will be sufficient; and hence it has been held that if a man, having a rent of 20*s.* a-year issuing out of land, grant the same to another until he shall have received thereout the sum of 21*l.*, the grantee will have the rent for twenty-one years, which exact term it will require to produce the sum of 21*l.* out of a yearly rent of 20*s.*: (*Bishop of Bath's case*, 6 Co. 35*b.*) And in like manner, if lands are leased to A. during the minority of B., the lease will be good for so many years as B. shall remain a minor; so that if B., at the date of the lease, be ten years old, the lease will be good for a term of eleven years, if B. shall so long live, whose minority would determine as well by his death as by his attaining his majority: (*Boraston's case*, 3 Co. 19 b.)

Term uncertain in the beginning may be rendered certain by matters ex post facto.]—A term, although uncertain in duration in the beginning, may nevertheless be rendered certain by matter *ex post facto;* as where a lease is granted for so many years as B. shall name, this term, although uncertain at the beginning, may be rendered certain by B. naming the years (*Bishop of Bath's case, supra*); still, this can only be done in the lifetime both of the lessor and lessee (*ib.*; and see *Say* v. *Smith*, Plow. 273); consequently, a

lease for so many years as the lessor's executors should name would be void, because no interest can pass out of the lessor during his lifetime, and after his death the naming of the years will come too late: (*Savill* v. *Cordell*, Godb. 24; *Parry* v. *Allen*, Cro. Eliz. 173.)

Where the term is limited for seven, fourteen, or twenty-one years.]—A term limited for seven, fourteen, or twenty-one years, as the lessee shall think proper, is not void for uncertainty, for it will operate as a certain lease for seven years at least, whatever may be its validity as to the other two eventual terms of fourteen and twenty-one years; and it seems that if the lessee continues in possession after the expiration of the seven years, the lease will then become good for the fourteen years, at the end of which time, should he still continue the possession, it will be good for the twenty-one years: (*Ferguson* v. *Cornish*, 2 Bur. 1032.)

3. *Certainty of termination.*

What will be a sufficient certainty of termination of term.] —The certainty of the termination of the term, like its commencement and duration, will be sufficient, whether it be positively certain, or be capable of being reduced to a certainty by some collateral determination before its expiration by effluxion of time; as, in the case of lands being leased to A. for a term of ninety-nine years, if B., or any other persons therein mentioned, should so long live; or for a term of seven, fourteen, or twenty-one years, upon either the lessor or the lessee giving the other six months', or some other previous, notice of an intention to determine the tenancy.

Practical suggestions.]—If the term is to commence from the date of the lease, the usual plan is to limit the premises to the lessee "henceforth" for the term thereby expressed to be granted: (see the form 1 Con. Prec., Part III., Section II., No. VI., clause 3, p. 498, 2nd edit.) If to commence from a day past, as the 29th day of September last, for instance, from that day for the full end and term to be thereby granted: (see the form 1 Con. Prec., Part III., Section II., No. V., clause 3, p. 494, 2nd edit.)

Where the term is determinable on lives.]—If a term of years is to be made determinable on lives, it must be granted for a stated number of years, as ninety-nine years, for in-

stance, provided one or more persons therein named shall so long live; for there the utmost limit for which the term can endure is marked out with certainty, although it may be determined before by the happening of a collateral event, namely, the death of the lives before its regular expiration by effluxion of time, and consequently the limitation is good, upon the principle *certum est quod certum reddi potest;* but a term cannot be granted for so many years as A. B. may live, because, in the latter case, there is no certain limit to either its duration or termination: (Co. Litt. 45 b; Shep. Touch. 275.) In limiting a term of years determinable on lives, the limitation should be extended to the survivors and survivor of them, so as to prevent the possibility of any questions arising as to whether the term was only to endure during the joint lives of all the persons named, and to determine on the dropping of any one of such lives: (see the form 2 Con. Prec., Part III., Section II., No. VII., clause 3, p. 502.)

Where the term is limited for a life or lives, and afterwards for a term of years.]—It is a common practice in some parts of England, and also in the principality of Wales, to grant leases for lives with remainder to the same parties for a term of years: (see a form of this kind, 1 Con. Prec., Part III., Section II., No. VII., p. 501, 2nd edit.) One of the objects in granting leases in this form has been to give the lessees a right of voting at the election of county members, which the freehold interest they take during the existence of the lives will confer upon them, whilst the term running at the same time gives them a certain and permanent interest in the lands; for it must be remembered that the term of years, although a lesser estate, will not merge in the freehold, in cases where the term is the more remote estate; for, in order that the merger may take place, the reversionary estate must, in contemplation of the law, be the larger one; hence, although an estate for years, however long in point of duration, will merge in a more remote estate for life, yet, if an estate for life be limited to one, with remainder to him for years, or if one who has an estate for life purchases a long term of years in the same property, the term will not become merged in the freehold, because, notwithstanding the estate for life is the larger one in legal contemplation, it is the preceding estate, and therefore both may well subsist together in the same person: (1 Hughes Pract. Sales, 407, 2nd edit.)

Where the lessor takes a limited or uncertain interest in the

premises.]—If the lessor takes a limited or uncertain interest in the demised premises, so that his estate therein may possibly determine before the expiration of the term in the lease by effluxion of time, as in the case of a lease for years granted by a tenant for life, the limitation of the term to the lessee should be qualified by inserting at the end of the clause, "provided the estate and interest of the said lessor in the said premises shall so long continue."

Where an underlease only is granted.]—Where an underlease only is granted, it is a common practice to limit the term to commence at a day earlier than the term created by the original lease, so that it may expire a day earlier, and thus leave a reversion in the present lessor: (see the form 1 Con. Prec., Part III., Section II., No. VIII., clause 5, p. 506, 2nd edit.)

How term may be limited so as to avoid a forfeiture of copyholds.]—When a copyholder, desirous of granting a lease, is unable to procure the lord's licence for that purpose, then, in order to carry out his intent as far as circumstances will permit, the practice has been to limit the copyhold premises to the lessee from thenceforth for the term of one year, and (if the custom, or the lord will grant a licence for the same to be so demised, and so that the same premises shall not become liable to be forfeited, but not otherwise) thenceforth from year to year for the term of seven years, or for what other term the premises were intended to be granted: (see the form 1 Con. Prec., Part III., Section II., No. XI., clause 3, p. 516.)

V. Reddendum.

Of the reddendum clause.]—It is important that the reddendum clause should be correctly penned, as an error in the reservation of the rent may cause it to become altogether inoperative, or partially to fail of effect. Hence, if a lessor, having a freehold interest, was to reserve the rent to himself and his executors (*Sacheverall* v. *Frogate*, 2 Wms. Saund. 361), or, being possessed of a term of years, was to make the reservation to himself and his heirs (*Drake* v. *Monday*, 1 Cro. Car. 207), without *limiting it during the term*, in either of these cases the rent would determine with his death; for the executors in the first case cannot have the rent, although they be named, not being the representatives of the lessor *quoad* the reversion to which the rent is annexed; and the

heirs cannot have it, because they are not named at all. In the second instance, the heir cannot claim it because he cannot succeed to the reversion, which is only a chattel; and the executors cannot have it, because there are no words to carry it to them. But if, in either case, the rent had been made payable during the term, it would then have devolved upon the party actually entitled to the reversion; and although, in the first instance, the executors could not have taken the rent, it would nevertheless have devolved upon the heir as incidental to his reversion; and, in the second instance, although the heir could not have had the rent, it must have accrued to the lessor's personal representatives as incidental to their reversionary interests. The safest plan, therefore, seems to be to reserve the rent generally during the term, without reserving it to any one in particular, in which case it will accrue to the persons, whoever they may be, who are entitled to the immediate reversion expectant thereon: (see the form 1 Con. Prec., Part III., Section II., No. I., clause 4, p. 469.)

Where the lease is by mortgagor and mortgagee.]—But if the lease is granted by mortgagee and mortgagor, the latter being permitted to remain in possession of the mortgaged premises, a variation in the usual form of reddendum will become necessary, and the rent must be made payable to the mortgagee, his heirs or assigns, or his executors or administrators, according to the nature of the estate he takes in the premises, subject to such equity of redemption in such premises as the same are then liable to; and, in case of the redemption thereof, then rendering the said rents yearly and every year during the residue of the said term unto the said mortgagor, his heirs and assigns; and that subject to the proviso thereinafter contained with respect to the intermediate payment of such rent, and until determined by notice in manner thereinafter mentioned, the said rents shall be payable to the mortgagor: (see the form 1 Con. Prec., Part III., Section II., No. IX., clause 6, pp. 511, 512, 2nd edit.) To the above clause should then be added a proviso that the mortgagor shall receive rents until mortgagee shall give notice to the contrary to the tenants; followed by a declaration that the mortgagor's receipt shall be a sufficient discharge for such rent: (see the forms 1 Con. Prec., Part III., Section II., No. IX., clauses 6 and 7, p. 512, 2nd edit.) It will also be necessary to give the mortgagor a power to distrain for the rent which, for want of privity of estate between himself and the lessee, he would not otherwise possess:

(see the form 1 Con. Prec., Part III., Section II., No. IX., clause 9, p. 512, 2nd edit.)

Leases made by husband and wife of wife's lands.]—Where the lease is made by husband and wife of lands of which the husband and wife are seised in her right, the rent should be made payable to the husband and wife, and to the heirs of the wife: (see the form 1 Con. Prec., Part III., Section II., No. XII., clause 5, p. 520, 2nd edit.)

As to leases by tenants in tail.]—If the lease is made by tenant in tail, the reservation should be to the lessor and the heirs in tail, accordingly as the entail is limited; as, to the "lessor and the heirs of his body," or "the heirs male of his body," as the case may be: (see the form 1 Con. Prec., Part III., Section II., No. XII., *in notis*, pp. 520, 521, 2nd edit.)

Where the lease is granted by tenant for life and reversioner.]—In leases granted by tenant for life and reversioner, the reservation of the rent should be made to the tenant for life and his assigns, during his life, and after his decease to the person or persons for the time being entitled to the premises in reversion immediately expectant on the determination of the term thereby demised: (see the form 1 Con. Prec., Part III., Section II., No. XIII., clause 4, p. 523, 2nd edit.)

As to the reservation of a proportionate amount of the rent where the lease determines before the time of payment of rent arrives.]—If, as is usually intended, the lessor is to receive a proportionate part of the rent in case the lease is determined by the lessor entering for any breach of covenant, or any other sufficient cause for avoiding the term in pursuance of any stipulation or proviso to that effect contained in the lease, an additional reddendum will in such case become requisite (see the form 1 Con. Prec., Part III., Section II., No. I., clause 5, p. 469, 2nd edit.), otherwise, it seems, the lessor will lose his remedy for enforcing such payment; for his entry for the forfeiture before the time of payment of the rent arrived would be a waiver of the rent, and the acceptance of the rent would be a waiver of the forfeiture; nor, it seems, has the Apportionment Act (4 & 5 Will. 4, c. 22) made any alteration in the law in this respect: (see the form of reddendum of proportionate part of rent, 1 Con. Prec., Part III., Section II., No. I., clause 5, p. 469, 2nd edit.)

How reddendum should be penned where lands and goods are let at one entire rent.]—Where lands and goods are let at one entire rent, the whole rent will be considered as issuing out of the lands, and become transmissible accordingly (*Bird* v. *Higgonson*, 6 Ad. & Ell. 824); consequently, although the goods themselves would devolve upon the lessor's personal representatives in case of his decease during the term, the heir, if the lands were freehold, would be entitled to receive the whole rents, and the parties entitled to the goods would derive no benefit whatever from them during the continuance of the term. To prevent this consequence, the best mode seems to be to have two distinct reddendum clauses; one to the lessor, his heirs and assigns, in respect of the lands, and the other to the lessor, his executors, administrators and assigns, in respect of the goods: (see the forms 1 Con. Prec., Part III., Section II., No. III., clauses 5 and 6, pp. 481, 482, 2nd edit.)

Time of payment should always be expressed.]—To prevent doubt, the time of the first quarterly payment or half-yearly payment should always be expressed; but whether the day be near or remote is immaterial in point of law (3 Bulstr. 329), except in the case of reservations under powers particularly worded, or under enabling statutes: (see 2 Platt on Leases, 114.)

As to the reservation of penal rents.]—Where any penal rents are reserved for ploughing up ancient meadow lands, carrying on prohibited trades upon the demised premises, or any other matter the lease intends to prohibit, the rents should be reserved as such, and payable in the same manner as the other rents reserved by the lease, and not in the nature of a penalty; because neither courts of law or equity will relieve against penal rents reserved in that form, although it is the daily practice for courts of equity to relieve against penalties, and for courts of law to award less damages than the penalties amount to: (see the form of reservations of this kind, 1 Con. Prec., Part III., Section II., No. IV., clause A., *in notis*, p. 488, 2nd edit.; *id. ib.* No. XV., clause D., *in notis*, p. 532.)

As to corn rents.]—In some agricultural leases the amount of reserved rents is made to vary according to the average price of corn; the render of which is sometimes made in money, and at others in kind: (see the forms 1 Con. Prec., Part III., Section II., No. XVII., clauses A. and B., *in notis*,

pp. 545, 546, 2nd edit.) In some instances, also, one amount of rent is made payable in time of peace, to be augmented in time of war: (see forms of reservations of this kind, 2 Platt on Leases, appendix, p. 607.)

VI. COVENANTS.

Covenants should be made to run with the land.]—It is important that the covenants in a lease should be made to run with the land, for then an assignee of the term will become personally liable under them; but covenants can only be made to run with the land when entered into by parties having the legal estate in the premises. Whenever, therefore, a lease is made by mortgagee and mortgagor, although the concurrence of the both is, as we have before remarked, essential to the validity of the lease, still the covenants for the payment of rents and taxes, and to keep and leave the premises in repair, must be entered into with the mortgagee only, for he alone has the legal estate in the premises, and if the mortgagor were to be made the covenanting party, the covenants would thereby become mere covenants in gross: (*Smith* v. *Pocklington*, 6 Scott. 69.) For the same reason, also, the covenants for quiet enjoyment by the lessee must be entered into with him by the mortgagee, and not by the mortgagor: (see forms and practical suggestions thereupon, 1 Con. Prec., Part III., Section II., No. IX., clauses 9 and 10 and note (*b*), *in notis*, p. 513, 2nd edit.)

As to leases of dwelling-houses.]—The covenants which are commonly inserted in leases of dwelling-houses on the part of the tenant are, for payment of the rent and taxes, to keep and leave the interior of the premises in repair, and to deliver up possession at the end of the term; the landlord covenants to repair the exterior of the premises, and that the lessee shall have peaceable enjoyment of them during the term, and also to insure the premises against damage by fire: all these, with the exception of the covenant to insure against fire, are what are termed usual covenants; but the latter will not be included under that term, and therefore the charges for effecting or keeping up a policy of this kind cannot be enforced on the lessee, unless he enters into an express covenant for that purpose, and such covenant the lessor cannot compel him to enter into, unless he has previously bound himself to do so by an express contract to that effect.

Covenant for payment of rent.]—A covenant for payment

of rent, although implied from the word "*yielding and paying*," contained in the reddendum clause, is almost invariably inserted in every modern lease. It ought to correspond with the habendum, but this may be done very briefly, the lessee merely covenanting to pay "the said yearly rent at the several days and times aforesaid:" (see the form 1 Con. Prec., Part III., Section II., No. I., clause 6, p. 470.) When, however, the rent is reserved otherwise than yearly, half-yearly, or quarterly, the particular times of payment are generally repeated in this covenant; as, for example, if the rent is reserved payable monthly, the covenant would be to pay "the yearly rent of (*stating the annual amount*) by twelve equal monthly payments, at the several times herein before appointed for payment thereof:" (see the form 1 Con. Prec., Part III., Section II., No. II., clause 5, p. 477, 2nd edit.)

Where a house and the furniture are let together.]—If a house and furniture are let together, although, as we have before noticed, the lease should contain two reddendum clauses, reserving two distinct rents, one for the house and the other for the furniture, still, one covenant for the payment of the rent will be sufficient to embrace the both, and be in strict accordance with both reservations. By this the lessee covenants to pay unto the lessor, his heirs, executors, administrators or assigns, the yearly rents thereby reserved, according to the respective natures and qualities of the premises in respect of which the same are made payable, on the days and times thereinbefore appointed for the payment thereof: (see the form 1 Con. Prec., Part III., Section II., No. III., clause 7, p. 482, 2nd edit.)

Where additional rent is to be paid in case the lessee commits certain acts.]—But where additional rent is to be paid by the lessee in case he commits certain acts which it is the object of the lease to prohibit, such as ploughing up old meadow land, or carrying on certain trades on the demised premises, then a distinct covenant should be inserted to pay such additional rent in case the lessee shall do any of the acts whereupon the same shall become payable: (see form of covenant to this effect, 1 Con. Prec., Part III., Sect. II., No. XV., clause E. *in notis*, p. 533, 2nd edit.) In cases also where the rent is reserved, or made payable in any unusual manner, as in the case of leases granted by husband and wife of the wife's lands under the provisions of the statute 33 Hen. 8, c. 28, in which case the usual practice

is to reserve the rent to the husband and wife, and to the heirs of the wife, the covenant for payment of such rent should be with the husband and wife, and the heirs of the wife, to pay the rent to the husband and wife, and to the heirs of the wife, at the respective times therein before appointed for the payment thereof: (see the form 1 Con. Prec., Part III., Section II., No. XII., clause 6, p. 520, 2nd edit.) If the lease is by tenant for life and reversioner, the covenant should be to pay the rent to the tenant for life and his assigns during his life, and, in case of his decease during the continuance of the term, then to pay the same to the reversioner for all the residue of such term: (see the form 1 Con. Prec., Part III., Section II., No. XIV., clause 5, p. 526, 2nd edit.)

Where a surety concurs.]—Where a surety is a concurring party with the lessee for the purpose of joining in the covenants, the covenant should be a joint and several one that they, or one of them, will pay the rent on the several days and times therein appointed for payment thereof: (see the form 1 Con. Prec., Part III., Section II., No. II. *in notis*, p. 476.)

Rates and taxes.]—We have already pointed ont the propriety of the landlord and tenant coming to a distinct understanding as to the mode in which rates, taxes, and all other outgoings are to be discharged (*ante*, p. 490), the terms of which ought to be set out in the contract, and the covenant relating to those matters should be framed in strict accordance with such contract. We have also noticed that the tenant cannot exonerate his landlord from the payment of income and property tax in respect of the demised premises: (*ante*, p. 492.) Whenever, therefore, it is intended that all the other taxes are to be discharged by the lessee, it will be the more correct plan, when penning the above clause, to make an express exception of the landlord's property or income tax (see the form 1 Con. Prec., Part III., Section II., No. I., clause 7, p. 471, 2nd edit.), although this is rather matter of form than of actual importance, as it has been decided over and over again that an express covenant for payment of rent clear of all taxes, whether parliamentary or parochial, will be construed to refer to such taxes as a tenant may lawfully covenant to pay in exoneration of his landlord: (*Readshaw* v. *Balders*, 4 Taunt. 57.)

Where rates or taxes are to be paid by the lessor.]—

Where the lessor is to pay any of the rates and taxes, all such as he is to pay should be enumerated in his covenant; and, if he is intended to pay the rates as well as the taxes, it will become necessary, for the reasons we have before mentioned (see *ante*, p. 490), to extend the clause to those charges to which the owner or occupier will be liable, as well as those which will be chargeable upon the land: (see the form of covenant, 1 Con. Prec., Part III., Section II., No. III., clause 12, p. 485, 2nd edit.)

Covenants to keep and leave premises in repair.]—We have also previously noticed (*ante*, p. 493), that it is essential, in the covenant relating to the repairs of the premises, that the lessee should covenant to keep, as well as leave, the premises in repair, otherwise no breach will be incurred until the end of the term, when the tenant actually comes to leave the premises: (see the form 1 Con. Prec., Part III., Section II., No. I., clause 8, p. 471, 2nd edit.; *ib.* No. II., clause 6, p. 476; *ib.* No. III., clause 8, p. 482.) But he ought not, in the absence of some express agreement on his part, to be required to keep or leave the premises in a better condition than he finds them; added to which, he will not be liable for the fair wear and tear of the premises; and he ought, as we have before remarked, to take care that his landlord agrees that he shall not be liable for accidents incurred to the property by fire, flood, storm or tempest, and cause the same to be inserted in the lease accordingly: (see the form 1 Con. Prec., Part III., No. III., clause 8, p. 482.)

Where furniture is let with the house.]—Where household furniture is let with the house, the lessor usually requires the lessee to enter into a covenant to deliver up the former in a proper state and condition, fair wear and tear only excepted, and to supply the place of any articles lost or destroyed by similar articles, and not to remove any of the articles from off the demised premises: (see the form 1 Con. Prec., Part III., Section II., No. III., clause 8, pp. 482, 483, 2nd edit.)

Where any repairs are to be made by the landlord.]—In case any of the repairs are to be made by the landlord, the nature of such repairs should be distinctly expressed in the covenant. In addition to this, it is sometimes the practice to insert a clause empowering the lessee to make all such repairs as the landlord has covenanted to make, but

neglects to perform, and at the same time authorizing the former to deduct the charges out of the rent (see the form 1 Con. Prec., Part III., Section II., No. I., clause A. *in notis*, p. 472, 2nd edit.); but this the lessee has no actual right to insist on having inserted in the lease, in the absence of an express agreement to that effect, which, if he intends to rely upon, he should take care to have inserted in the contract, or terms upon which he agrees to take the premises.

Covenants not to assign without licence, and other restrictive covenants.]—As we have already in the preceding chapter (*ante* p. 494, *et seq.*), attempted to point out the particular mode in which covenants not to assign or underlet without licence, or to carry on certain trades upon the premises, and other restrictive or prohibitory covenants, and also covenants relating to the renewal of leases ought to be penned, we refer our readers to that portion of the work, which will render any repetition of any of those matters here altogether superfluous.

Covenants to insure against fire.]—If the lessee is to covenant to insure against damage by fire, care should be taken on the lessor's part to render it imperative on the lessee to produce the policy and the receipts and vouchers of payment immediately after any such policies are renewed. This becomes a matter of considerable importance where the lessee neglects to keep up the policy, and the lessor brings ejectment against him for the forfeiture caused by this breach of covenant; for the burthen of the proof will be upon the plaintiff, however great the difficulty, though it is otherwise in an action of *covenant;* and the lessee's refusal to show the policy to produce at the trial, or to give any information as to the office in which the insurance has been effected, is no evidence of breach of covenant (*Doe d. Bridges* v. *Whitehead*, 8 Ad. & Ell. 571); though it is *primâ facie* evidence of a breach of covenant to insure, to show that the assignee has discontinued the insurance in the office in which it has been previously effected: (*Doe ex dem. Ive* v. *Scott*, 1 Am. & Hodge, 76.)

Agricultural leases.]—In agricultural leases, the particular mode of cultivation should be very distinctly set out, and this the more so, as, according to the rules of common law, it is not considered waste, either wilful or permissive, for the tenant to leave the land uncultivated. In order to oblige him to farm the lands in a husbandlike manner, there must

either be an express contract to do so, or such contract must be implied from the custom of the country (*Hutton* v. *Warren*, 1 Mees. & Wels. 466, 472-6), which must ever vary according to soil, climate, situation, and the habits of the agriculturalists in the neighbourhood, all which may be superseded by the express stipulations of the lease: (*Duke of Roxburghe* v. *Robertson*, 2 Bligh. 156.)

Usual covenants contained in agricultural leases.]—The usual covenants on the part of the lessee are to pay the reserved rents and taxes, to keep the premises in good repair, and the lands well cultivated, and so to leave the same at the expiration of the term; not to injure the trees or saplings, nor to cut the hedges, except at the proper seasons of the year; to level molehills and cut down rushes; not to mow the meadow lands more than once in the year, and to stack all the corn and hay, and consume all the manure on the premises: (see the form 1 Con. Prec. Part III., Section II., No. XV., clauses 9 to 15 inclusive.)

As to the preservation of trees, &c.]—In the covenant relating to the preservation of the trees, it is sometimes stipulated that the lessee will not fix any rails or palings thereto, or allow the same to be injured by the cattle; and, in order to preserve the roots from damage, that the lessee will not allow any unrung pigs to be kept upon the demised premises; and where there are any orchards on the premises, the lessee is usually made to covenant that the tenant will keep such orchards in proper condition, taking care to remove the old and decayed trees, and supply young trees in their places, and not suffer any cattle to depasture there that may be liable to injure the trees, but which prohibition does not, it seems, extend to pigs, if they are properly rung before they are turned into them: (see the form 1 Con. Prec., Part III., Section II., No. XV., clauses 9 and 10, pp. 534, 535, 2nd edit.)

Where tenant is to consume all manure or hay on the premises.]—When the tenant is bound to consume all the manure or hay on the premises, it should be stipulated whether, in case any be left unspread or unconsumed upon the land at the expiration of the term, the landlord or the tenant is to be entitled to the benefit of it, although, it seems, the more prevailing practice is to allow this privilege to the tenant, which, if intended, should always be so expressed in the lease: (see the form 1 Con. Prec., Part III.,

Section XI., No. XV., clause 15, p. 536, 2nd edit.) This is usually done by providing that the lessor shall allow the tenant the value thereof, the amount of which, in case of dispute, is to be determined by arbitration in the usual manner. But if the landlord is to have the benefit of the unconsumed manure, the lease then provides that it is to be left by the tenant on the premises, for the use of the landlord or his incoming tenant: (see the form *ib. id.*, clause L., *in notis*, p. 536.)

How valuation should be made.]—In making a valuation of the above kind, it has been lately held that the proper way to express it was not at a consuming and marketable price, but at the fair value as it stood on the premises, and as it stood as between an outgoing and incoming tenant: (*Cumberland* v. *Bowles*, 21 L. T. Rep. 149.)

As to covenants to preserve boundaries and to keep a field book.]—In some leases, particularly where the premises are of considerable extent, the tenant is required to enter into a covenant not to pull down or destroy any of the hedges or fences, or to alter any of the landmarks or boundaries of the demised premises (see the form 3 Con. Prec., No. CXXIII., clause 13, p. 735, 1st edit.), and also to keep a field book, according to a form to be delivered to him by his landlord, wherein he shall make a true and faithful entry of the manner in which the several fields have been cropped and cultivated in each year of the term: (see the form *ib.*, clause 14.)

As to the removal of fixtures.]—Since the statute 14 & 15 Vict. c. 25, empowers a tenant to remove fixtures and buildings erected by him on the demised premises, unless the lessor elects to take them at a valuation, it will now be necessary, whenever it is intended that the buildings or fixtures erected or affixed by the tenants are to become the absolute property of the landlord, without the latter making any compensation for them, to have an express stipulation to that effect inserted in the lease: (see the form 1 Con. Prec., Part III., Section II., No. XVII., clause C., *in notis*, p. 547, 2nd edit.)

Right of entry for landlord to prepare land for tillage in the last year of term.]—It is a common practice for a landlord to reserve a right of entry on some portion of the lands at some period of the last year of the term, but before its

actual expiration, for the purpose of enabling an incoming tenant to prepare the ground for future crops. This is generally done by the lessee entering into a covenant to that effect, stating at what time such right of entry is to commence, and over what portion of the lands it is to extend, and that the lessee shall be allowed reasonable compensation for the same: (see the form 1 Con. Prec., Part III., Section II., No. XV., clause 17, p. 537, 2nd edit.)

Covenants usually entered into by lessee in building leases.]—In building leases, the lessee usually covenants for payment of the rent and taxes, and to keep and leave the demised premises in good and tenantable repair; in addition to these, he generally enters into special covenants to erect certain dwelling-houses or other buildings, according to some particular plan or specifications, the terms of which must necessarily vary so much in each particular case, that it seems scarcely possible to lay down any general directions that will be of much practical assistance in framing covenants of this nature. It is also often stipulated that the lessee shall not alter any of the buildings, when completed according to the plan, without the lessor's licence or consent; to which is often superadded a covenant, that the lessee shall not carry on offensive trades on the premises, and to insure the buildings against damage by fire. If the buildings are to form part of a street, the lessee also covenants to contribute a proportionate part towards the cleansing, paving, and lighting of the street, as also towards the drainage and sewerage of the same: (see the form 1 Con. Prec., Part III., Section II., Nos. I. and II.) It is also a common practice to require the lessee to covenant not to alter the plan of the elevation of the houses, or to throw out any bay windows, or any other projections that may in any way intercept the view of the adjoining houses: (see the form 3 Con. Prec., No. CXXIII., clause 13, p. 735, 1st edit.)

Covenants from the lessor.]—Where the lessor is seised in fee, it is not usual for him to enter into any covenants for title, or any further covenants than that the lessee shall peaceably enjoy the demised premises during the term thereby demised. But where the lessor takes only a term of years in the premises, it is a very common practice to call upon him to covenant that the lease under which he holds the premises is a valid one; that the rents and covenants thereby reserved and contained have been duly paid and performed; that he has good right to underlet; for quiet

enjoyment, freedom from incumbrances, and for further assurance. In addition to which, he should also covenant to produce the original lease to the lessee, and to pay the rents and perform the covenants of such lease on his part to be paid and performed, and to indemnify the underlessee therefrom; to which is often superadded, a stipulation that the underlessee shall not be liable to pay his lessor any rent before the latter shall produce a receipt for the last year's rent reserved upon the original lease (see the form 1 Con. Prec., Part III., Section II., No. II., clause A., p. 564, *in notis*); and sometimes a power of distress on other parts of the lessor's property, by way of further indemnity to the lessee: (see the form, *ib.*, note B., p. 565.) Another form of covenant, sometimes entered into by a lessor, is to concur in underleases for the purpose of apportioning the rent: (see the form 1 Con. Prec., Part III., Section III., No. I., clause 9, p. 558, 2nd edit.)

As to the rebuilding of demised premises.]—In addition to the above covenants, the landlord, if needful, enters into a covenant to rebuild the demised premises in case they should be burnt down, destroyed or injured by fire, tempest, or other accident, which, in the absence of such covenant, as we have already seen, a lessee has no power to compel his lessor to do; but the latter cannot be required to enter into any covenant to that effect, unless he has bound himself to do so by his contract: (see the form of a covenant of this kind, 1 Con. Prec., Part III., Section II., No. I., clause B., *in notis.*)

Usual covenants entered into by landlord in agricultural leases.] —The usual covenants on the part of the landlord in agricultural leases, are for quiet enjoyment by the lessee during the term; and, where the estate is well supplied with timber, the landlord generally covenants to supply the tenant with rough wood for the purpose of repairs: (see the form 1 Con. Prec., Part III., Section II., No. XV., clause 19, p. 538, 2nd edit.) To this is often superadded a covenant that the tenant shall be permitted the use of some of the barns, or of a part thereof, for some months after the expiration of his term, for the purpose of threshing out his corn: (see the form *id. ib.*, clause 20, p. 538.)

VII. Provisoes.

The most common provisoes contained in a lease are, for avoiding the term by the lessor for nonpayment of rent,

upon breach by the lessor for nonperformance of all, any, or either of the covenants therein contained; for determining the term, by either the lessor or the lessee, upon notice, before its regular expiration by effluxion of time; and for cesser or suspension of the rent, in case the demised premises are burnt down, or rendered untenantable by fire, tempest, or any other kind of accident.

Proviso for re-entry for nonpayment of rent.]—A proviso for re-entry for nonpayment of rent, or for breach of any of the covenants in the lease, is an important clause for a lessor, who would otherwise often be deprived of a most effectual remedy against a bad, or an unprofitable tenant. This clause is of great consequence, also, where a landlord is desirous of getting rid of a tenant who wilfully commits a breach of covenant, which may prove of serious injury to the property; as the carrying on of offensive trades, or assigning or underletting the premises to an insolvent or disreputable tenant, in direct breach of a covenant expressly prohibiting those acts, and for which, although the landlord has his remedy by action at law on the covenant, will give him no right of entry to determine the term: (*Paul* v. *Nurse*, 8 B. & C. 488.)

Lessor's right of entry to avoid term usually made conditional on his previous demand of rent, and its nonpayment.]—In most modern leases, in the proviso for re-entry for nonpayment of the rent, such right of re-entry is made conditional upon the rent being previously demanded and not paid, and no sufficient distress being found upon the premises. This is but a fair and reasonable qualification, and one which a lessee has a right to insist upon when negotiating for the lease, and one which his solicitor should take care to see inserted in it, otherwise the lessee may, by inadvertence, expose himself to the risk of forfeiting his term, which, even if a court of equity should relieve against, would cost him much vexation and expense which he ought not to have incurred: (see the form 1 Con. Prec., Part III., Sec. II., No. I., clause 12, p. 473, 2nd edit.) To the above a qualification is sometimes added, that no breach of any of the covenants, except the covenant for nonpayment of rent, or insurance against fire, shall cause a forfeiture of the lease, unless the lessor shall give the lessee some previous reasonable notice (as three or six calendar months), setting forth the breaches, and requiring the same to be rectified within that period:

(see the form of this proviso, 3 Con. Prec., No. CXXII., clause 22, 1st edit.)

Where premises are demised at distinct rents.]—It not unfrequently happens that premises are demised at distinct rents, and it is intended that the lessor is only to have a right of entry upon that part, in respect of which the rent shall remain unpaid, or on account of a breach of covenant shall have been incurred. To carry out this object, it should be provided that in case of any such nonpayment, or breach of covenant, it shall be lawful for the lessor to re-enter upon that part only of the demised premises in respect of which there shall have been such nonpayment or breach, and that such right of re-entry shall not extend to or include any part of the demised premises, in respect whereof the rent has been duly paid, and the covenants and agreements duly observed and performed: (see the form 3 Con. Prec., No. CXXII., clause 15, pp. 723, 724, 1st edit.)

Proviso for determining term determinable on lives where lessee fails to show that they are in existence.]—Where a lease is determinable on lives, it is a common practice to insert a proviso empowering the lessor to determine the term in case the lessee fails to show the existence of the lives upon whose decease it is determinable: (see the form 1 Con. Prec., Part III., Section II., No. VI., clause B., *in notis*, p. 498, 2nd edit.)

As to proof of existence of lives.]—With respect to proof of the existence of lives, it is, by the statute 19 Car. 2, c. 6, enacted, "that if any such person or persons for whose life or lives such estates shall have been or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm for seven years together, and no sufficient proof be made of their lives in any action for the recovery of such tenements by the lessors or reversioners, in such case they shall be accounted dead, and the judges shall direct the jury to give their verdict accordingly:" (sect. 2.) Upon the construction of this section of the statute it has been held, that the fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of the family, is *primâ facie* evidence of the death of the tenant for life: (*Doe* v. *Deakin*, 4 B. & Ald. 433; and see *Doe* v. *Jesson*, 6 East, 85; 1 Hughes Pract. Sales, 2nd edit.) The fifth section of the above-mentioned act, however, contains a proviso, "that if any person or persons shall be evicted, and afterwards such

person shall return, or shall, on proof in such action aforesaid, be made or appear to be living, or to have been living at the time of eviction, that then and from thenceforth the tenant or tenants who were ousted of the same, his or their executors, administrators, or assigns, may re-enter, re-possess, have, hold, and enjoy the said lands or tenements, in his or their former estate, during the life, or for so long a term as the said person upon whose life the said estate or estates depend shall be living, and shall, upon action brought by them against the lessors, reversioners, tenants in possession, or other persons respectively, who since the said eviction received the profits of the said lands or tenements, recover for damages the full profit thereof, with lawful interest from the time he or they were ousted and kept out of the said lands or tenements; and this as well in the case where the said person or persons, upon whose life such estate or estates did depend, are or shall be dead at the time of bringing such action as if they were living." By the statute 6 Anne, c. 18, also, "any person claiming any estate in remainder, reversion, or expectancy, after the death of any person within age, married woman, or any person whatever, may apply to the Court of Chancery, and procure an order for the production of such person, and upon refusal, such person shall be taken to be dead; but if, in any action, such person shall appear to have been living, the party ousted may re-enter and recover damages for the profits during the time of such ouster."

Proviso that lessor may affix notice to let upon the premises.] —A proviso is also sometimes inserted in a lease authorizing the lessor, during the last six months, or some other short period before the determination of the term, to place a notice to let on the premises, which otherwise he would have no right to do, and his doing so would be an act of trespass. If, therefore, the lessor intends to reserve this right, he should stipulate for it in his contract, otherwise he will have no right whatever to insist upon its insertion in the lease.

Proviso for cesser or suspension of the rent.]—When it is intended that there is to be a suspension of the rent, in case of the destruction of the demised premises by fire or tempest, until they are again put into tenantable repair by the landolrd, an express proviso to that effect will be necessary; and if this be not expressly stipulated for by the terms of the contract, the tenant will have no right to insist upon having it inserted in the lease. The clause usually provides that in case of any

such destruction or injury, the yearly rent, or a just proportion thereof, according to the amount of injury sustained, shall cease or abate so long as the same premises shall continue wholly or partially untenantable in consequence of such destruction or damage; and that in case any dispute shall arise as to the amount of such abatement or suspension, the same shall be determined by the award of two referees, or their umpire, in the usual manner, which award is to be made a rule of one of Her Majesty's courts at Westminster: (see the form 1 Con. Prec., Part III., Section II., No. I., clause 9, pp. 472, 473, 2nd edit.)

Proviso for determining term upon notice.]—We have attempted, in the preceding chapter, to point out the way in which a proviso for determining the term by notice by either landlord or tenant, before its regular expiration, should be penned, which will render any further remarks upon that head in this place altogether superfluous. At the same time, it may be proper to remark here, that the powers of the above-mentioned proviso may be extended so as to authorize either of the parties to determine the term as to certain portions of the premises, as well as to the whole of them, leaving it in force as to part, and avoiding it as to the residue: (see the form 3 Con. Prec., No. CXXII., clause 16, p. 724, 1st edit.)

CHAPTER III.

MINING SETTS AND LEASES.

I. General Practical Observations.

Right of working mines, how usually conferred.]—The right of working mines and quarries is granted, either by a licence conferring that privilege, or by an actual lease of the premises. A licence to mine is distinguishable from a lease in many essential particulars. The former, being only an incorporeal hereditament, confers a mere right, and not necessarily a right exclusive of similar privileges in other parties, and in all cases only conferring an actual right of property in the minerals after they have been severed from the freehold and taken into the possession of the party (*Doe d. Hanley* v. *Wood*, 2 Barn. & Ald. 274); whereas a lease passes an actual interest in the thing demised, the right to which attaches even before the substance is extracted or taken. Still, a mere licence to search is a very usual, if not the most usual, mode of grant in the greater portion of our mining districts, which, although it does confer an exclusive

right, nevertheless confers such an interest in lands as cannot be revoked or countermanded by the grantor, unless the instrument granting such licence contains an express stipulation to that effect: (*Liggins* v. *Ings*, 5 Moo. & Pa. 712.) Still, the privilege which this licence confers to the grantee does not deprive the grantor, or persons claiming under him, from exercising similar rights within the limits of his sett, provided they do not interfere with the workings of the grantee: (*Cheetham* v. *Williamson*, 4 East, 469.)

Licence may be so worded as to confer an exclusive privilege.]—But although a licence to search does not necessarily confer an exclusive privilege, it may nevertheless be so worded as to convey that right, to the exclusion of every other person, by simply inserting in the granting clause of the instrument that the grantee shall have this exclusive liberty. Still, the grant of this exclusive right ought to be directly expressed in the granting clause; for although, if the description should fail in this respect, the intention might still be gathered from other parts, or from the general scope of the instrument, it would seem that at law the right to work would not be exclusive, but the instrument would merely operate as a written contract for an exclusive right, which in equity, and in equity only, would be binding on the grantor and those claiming under him; yet, it seems that if this right could be considered as included in a covenant entered into with the grantor, or if any particular recitals or expressions should suffice to constitute a legal covenant, then such a contract would, even at law, be held to run with the land, and bind the assignees as to any of its profits.

How licence may be granted.]—A licence is granted, either by an agreement under hand only, or by an indenture; in the former case, an agreement stamp will be sufficient to cover it; but in the latter, it must be stamped as a deed.

General outline of usual form of licence.]—The general form of licence, whether it be by agreement or by deed, authorizes the grantee to search for minerals within certain specified limits for some certain term, varying from one to twenty-one years or upwards, and to raise, prepare, and sell all such minerals as shall be so raised therefrom, and to adopt all such means and contrivances as may be necessary for carrying out all the above-mentioned objects; the grantee rendering to the grantor a rent either in money or in kind,

or both, and undertaking to prosecute the search with diligence; to render a due account of all ores raised, and to pay the reserved dues in respect of the same; and in case of failure on the part of the grantee to observe the terms and conditions of the sett, that the same shall become absolutely void and forfeited: (see the form of an agreement for a sett, 1 Con. Prec., Part III., Section I., No. VIII., pp. 464, 465, 2nd edit.)

As to quarries.]—A licence to work quarries, of every kind or description, is penned in much the same way as a licence to search for ores and minerals, but in licences of the former kind it is more usual to reserve a certain annual rent in money, which the grantee covenants to pay; in order, therefore, to carry out the latter object, it becomes necessary that the instrument should be a deed. It is also usual to insert a power of distress for recovering any arrears of rent that may accrue due during the term, concluding with the usual proviso empowering the grantor to determine the term in case of nonpayment of rent, or for breach of covenant by the grantee: (see the form 1 Con. Prec., Part III., Section II., No. I., pp. 572, 574, 2nd edit.)

Advantages of a deed over a mere agreement.]—In all mining setts, unless the licence is intended merely as a trial, to see what the land is likely to produce, and with a view to a more formal instrument in case the search should prove satisfactory, a deed under seal, whereby all the parties may become mutually bound as well at law as in equity, will be preferable to a mere agreement, the essential parts of which can be only enforced through the medium of a court of equity.

Where the licence is entered into by a steward or agent.]—If the licence be entered into by the steward or agent of the grantor, it should be expressly stated that he enters into such agreement for and on behalf of his principal, and the grantee, before he binds himself by entering into any such agreement, should ascertain that such steward or agent is duly authorized by writing to make such grant, for otherwise the Statute of Frauds (29 Car. 2, c. 3, ss. 1, 2) disables him from creating or assigning any legal estate or interest for any term whatever. And notwithstanding such steward or agent, by signing an agreement in the name of his principal, may pass an equitable interest in rights of this description, it seems that this can only be done where such an authority

can be shown by usage, or the recognition of former acts of a similar nature; and in all such cases it is essential that he should strictly conform to the usages which have been established in the exercise of his authority, and he will not be allowed to bind his principal by the adoption of a mode ot transacting business contrary to the previous regulation of an established custom which has been acquiesced in by the latter. Thus, as a learned writer on the subject very aptly remarks (Bainbridge on Mines, 92), "It is presumed the introduction of unusual stipulations with respect to the operations of mining, or the agreement for a demise, or a licence to work for an unwarrantable period of time, will not be binding on the owner without his consent or recognition. But agreements of this kind may of course bind the other parties, and *pro tanto* the principal. And in conclusion, it may be submitted that when a mining agent signs an instrument, which in its language amounts to a demise or lease, but which necessarily fails in conferring a legal interest for want of a written authority of the agent, such an instrument will be supported as a sufficient agreement to bind the principal. In order, however, to obtain equitable assistance, there must always be a valuable consideration; but the render of dues, or an agreement to make a money payment, will be amply sufficient for this purpose; and that whether it does or does not appear on the face of the agreement."

II. Grant or Licence of Mining Setts.

1. As to the date, parties, recitals, and testatum clause.
2. Exceptions and reservations.
3. Habendum.
4. Reddendum.
5. Covenants.
6. Provisoes.

1. *As to the Date, Parties, Recitals, and Testatum Clause.*

As to the date and parties.]—When a mining sett or licence to search for minerals is granted by deed, the instrument commences with the date and names of the parties, in the same manner as in an ordinary lease; in like manner, the party having the legal estate must be the granting party, as must all other parties having an interest in the property, who would be the necessary concurring or consenting parties in case an actual lease had to be granted.

Recitals.]—Recitals are as unfrequent in mining setts as in ordinary leases, being only used for the purpose of showing

the relation of the granting parties, or the authority under which the grant is made, as, under similar circumstances, would be necessary in a lease.

Testatum.]—The consideration for which the sett is granted must, for the reasons we have previously stated (*ante*, p. 508), be accurately set out in the testatum clause. The usual operative words are "give and grant," by which the grantor confers upon the grantee, his partners, co-adventurers, executors, administrators and assigns, full and free liberty, licence, power and authority to dig, work, mine and search for all the ores and minerals (*specifying them*) in, under and throughout the parcels (which should be then particularly described, and their boundary correctly defined), and to raise all such ores as shall be found on the premises, and then and there to dress and render them fit for sale, and carry off the same, and within the limits of the sett to make adits and pits, construct water-courses, and erect such buildings, engines and machinery, as may be considered necessary for the effectual exercise of such licence: (see the form 1 Con. Prec., Part III., Section IV., No. II.. clause 2, p. 576, 2nd edit.)

2. *Exceptions and Reservations.*

Usual exceptions and reservations.]—The usual exceptions or reservations by the grantor are, the right of erecting engines and driving adits within the limits of the sett, but so, nevertheless, as not to impede the exercise of the grantee's rights within such limits (see the form 1 Con. Prec., Part III., Section II., No. III., clause 3, p. 588, 2nd edit.; *ib.*, No. IV., clause 6, p. 602); but it seems that this exception, in reality, confers no greater right than the grantor would otherwise retain: (as to which see *ante*, p. 538, and the authorities there referred to.)

Where the licence is restricted.]—The right of mining is frequently restricted to some particular kind of ores, or to metallic ores or minerals only, and not allowed to extend to coal, slate or limestone; and sometimes *vice versâ*. Whenever this is intended, it will be proper to make an express exception to the lessor of whatever is to be excepted out of the sett: (see a form of this description, 1 Con. Prec., Part III., Section II., No. V., clause E., *in notis*, p. 612.)

3. *Habendum.*

Habendum clause, how usually penned.]—The usual terms of the habendum clause are, "TO HAVE, HOLD, USE, EXERCISE, AND ENJOY" the licence thereby granted to the grantee or grantees (as the case may be), his [or their] executors, administrators, or assigns, from thenceforth for the term thereby granted, in the same form of limitation as in case of an actual demise: (see the form 1 Con. Prec., Part III., Section III., No. II., clause 3, p. 577, 2nd edit.) If the term is to be determinable in any way before its regular expiration, the clause should be qualified accordingly.

4. *Reddendum.*

The reservation of the rents or dues must be to the same persons as would be entitled to the same in the case of a lease; consequently, if the sett is granted by a mortgagee and mortgagor, the rents or dues must be made payable to the mortgagee; but if it be intended that the mortgagor shall receive such rents and dues, then the clause should be by a proviso that the same may be paid to him until the grantees shall receive notice from the mortgagee to the contrary: (see the form 1 Con. Prec., Part III., Section II., No. II., clause C., *in notis*, p. 577, 2nd edit.)

As to the mode in which the render may be made.]—The render may be made in money or in kind, or in both ways; and may also be made to shift from one kind of payment to the other; as from a render in kind to a render in money, or *vice versâ*, as shall be agreed upon between the parties. It may also be made to vary in amount in respect of the different kind of ores raised, a lesser amount being frequently reserved for one kind than another, on account of the difference in their relative proportions in value, or of the expense likely to be incurred in raising them: (see the form 1 Con. Prec., Part III., Section III., No. III., clause 18, p. 597, 2nd edit.) A reduced render is sometimes substituted in case the grantees complete certain engines or machinery for carrying on and working the mine in a more effectual manner: (see the form 1 Con. Prec., Part III., Section III., No. II., clause D., *in notis*, p. 578, 2nd edit.) The most common practice is, however, to make the render in money, but allowing the grantor the option of receiving his dues in kind, if he pleases to do so at any time, upon giving due notice thereof in writing to the grantees: (see the form 1 Con. Prec., Part III., Section II., No. III., clauses 5 and 6, pp. 588, 589, 2nd edit.) One principal reason

for this arrangement has been, that the lords are rateable in respect of the dues derived from such mines when reserved in kind, but are not rateable when the dues are reserved in money; and it was for the purpose of obtaining this exemption that a money render was reserved. A bill, however, has been, or is intended to be, brought into Parliament, by which it is proposed that the occupiers of all mines, other than coal mines, shall be rated, whether the dues shall be reserved in money or in kind, which, if it becomes law, must of course render all mining dues rateable to the poor, without any reference as to the mode in which such dues are to be paid.

Where the render is in money.]—Where the render is made in money, the amount is calculated according to some proportionate part of the money realized by the sale of the ores, as one twelfth or fifteenth part for instance, and the payment is generally to be made at the end of every two months, or some other stated time after such sale: (see the form 1 Con. Prec., Part III., Section II., No. III., clause 5, p. 588, 2nd edit.)

Where the render is in kind.]—Where the render is to be made in kind, it is of some portion of the ores, as one twelfth or fifteenth part or share thereof, after the same shall, at the expense of the grantees, have been dressed and made merchantable, and divided or laid out by them: (see the form 1 Con. Prec., Part III., Section III., No. II., clause 4, p. 577, 2nd edit.)

Where the render is to be either in money or in kind at the grantor's option.]—And when the render is to be in money or in kind at the grantor's option, the render is first reserved in money in the manner above pointed out, followed by a proviso, that in case the grantor shall desire a render in kind in lieu thereof, and shall give notice thereof in writing to the grantees, then, after the expiration of some specified time, usually two calendar months, until the same shall be revoked by the grantor, which he is thereby authorized to do, he shall receive the same share of the ores he previously received the value of in money, dressed, made merchantable, and fairly divided by the grantees, at their own expense: (see the form 1 Con. Prec., Part III., Section II., No, III., clause 8, p. 589, 590, 2nd edit.)

5. *Covenants.*

Covenants which are usually contained in a mining sett.]—The covenants in a mining sett usually entered into by the

grantee are for payment of the dues, whether in money or in kind; to prepare the ore for sale, at certain stated periods where the render is in money, and to make division of the ore at such stated periods, where the render is in kind; to give the grantor due and proper notice of such division; that the grantee will discharge all taxes and other impositions assessed or imposed upon the ores, dues, or rents reserved (except grantor's property or income tax); to work the mine in an effectual manner; to keep buildings, embankments, adits, shafts, and water-courses in proper repair; to permit the grantor to view the condition of the mine; to repair the same upon notice; and to keep proper books of accounts to be at all reasonable times open to the inspection of the grantor: (see the form 1 Con. Prec., Part III., Section III., No., III., clauses 7 to 15 inclusive, pp. 590 to 594, 2nd edit.) The only covenant the grantor usually enters into, is, for peaceable enjoyment of the grantee during the continuance of the term: (see the form 1 Con. Prec., Part III., Section III., No. II., clause 12, p. 585, 2nd edit.) Sometimes, however, the grantor enters into the usual qualified covenants that he has good right to grant or demise, for peaceable enjoyment, and for further assurance; but these covenants are much more frequently entered into where an actual lease of a mine is granted, than in those cases where a mere mining licence is conferred: (see the forms of the above mentioned covenants, 1 Con. Prec., Part III., Section III., No., V., clauses 24, 25, 26, pp. 618 to 620.)

Where there are several grantees.] — If, as frequently happens, the sett is made to several grantees, it is the common practice to require them to enter into joint and several covenants: (see the form 1 Con. Prec., Part III., Section III., No. II., clause 5, p. 579, 2nd edit.)

Special covenants.]—In the covenant to work the mine in a proper and effectual manner, it is sometimes provided that the grantees are to keep a certain number of miners constantly employed therein, to which is sometimes superadded, that the grantee, after some specified notice given by the grantor, will work in a minerlike manner any lode left untried for some certain stated period; as also to yield up such parts of the mine as shall have been left unworked for some certain stated time: (see the form 1 Con. Prec., Part III ., Section III., No. III., clauses A. and B. *in notis*, pp. 591, 592, 2nd edit.)

Compensation for surface damage.]—It is also common to add to the covenant to work the mine effectually, that in so doing the grantees shall do no further injury or damage to the surface of the land than is absolutely necessary or unavoidable (see the form 1 Con. Prec., Part III., Section III., No. II., clause 7, p. 581, 2nd edit.); and where the mine runs through or adjoins to any cultivated lands, it is also usual for the grantor to require the grantees to covenant to make compensation for surface damage (see the form 1 Con. Prec., Part III., Section III., No., II., clause G. *in notis*, 2nd edit.) either to the grantor or his tenants, or other owners or occupiers of the lands injured by the workings of the mine, as the case may be, the amount of which, in case any dispute shall arise respecting the same, is to be settled by arbitration in the usual manner: (see the form 1 Con. Prec., Part III., Section III., No. III., clause 13, p. 592, 2nd edit.) With respect to the liability to make compensation for injuries of this nature, the law appears to be, that in the absence of any agreement to the contrary, in all cases where a lease or licence has been granted to work a mine, the grantees or adventurers are responsible for all injuries occasioned to the owners of property unconnected with the lands in which the mines are worked: (Bainbridge on Mines, 331, 343.) But where a mine is carried on for the benefit of the owner of the lands, and is worked by his agent, workmen, or even contractors, such owner will be the responsible party for all injuries arising from the working of such mine; for notwithstanding other persons may have contracted with him for the management of the whole concern without his interference, yet where the work is carried on for his own benefit, and on his property, all the persons must be considered as his servants or agents, notwithstanding any such arrangement, and must be responsible to all the world for their acts: (*Bush* v. *Steinman*, 1 Bos. & Pull. 304.)

To fence off shafts, and to fill up pits and adits.]—It is also common, unless the mines are on a very barren spot, for the grantees to covenant to fence off shafts, and to keep a safe passage for man and beast, cattle and carriages: (see the form 1 Con. Prec., Part III., Section III., No. III., clause D. *in notis*, p. 593, 2nd edit.) To this is sometimes superadded a clause that the grantees shall level embankments, and fill up all such shafts and pits as are not actually necessary for the working of the mine: (*Id. ib.* note E., p. 594 *in notis*, 2nd edit.)

As to accounts relating to the profits of the mine.]—In addition to the covenant by the grantees to keep proper books of account open for the grantor's inspection, the former sometimes covenant to deliver a true account of all sales made during the preceding quarter, or some other stated period, so as to show the full amount of the rents or sums of money which have accumulated during such period: (see the form 1 Con. Prec., Part III., Section III., No. II., clause F. *in notis*, p. 580, 2nd edit.)

Grantees to furnish a list of adventurers.]—It is also the common practice to require the grantees to furnish the grantor with a list of the names of all the adventurers, and of the shares or interests which they take in the mine; as also of every other person who shall at any time during the continuance of the sett have been an adventurer in such mine: (see the form 1 Con. Prec., Part III., Section III., No. IV., clause 16, p. 606, 2nd edit.)

Power of distress.]—It it also usual to give the grantor a power to distrain for any arrears of the reserved rents or dues, and to dispose of the distresses in the same manner as in cases of distress for rent between landlord and tenant: (see the form 1 Con. Prec., Part III., Section III., No. II., clause 16, p. 595, 2nd edit.)

To leave fixtures and machinery.]—It is sometimes arranged that the grantor shall have the option of purchasing any fixtures or machinery belonging to the mine, which at the expiration of the term shall remain upon the premises. The arrangement seems best carried on by the grantees entering into a covenant to leave all such fixtures and machinery in proper repair upon the premises as the grantor shall elect to purchase at a price to be agreed upon as thereinafter mentioned, with a proviso that the lessor shall not be entitled to purchase unless he shall give one calendar month's previous notice; and that the price to be paid for such articles shall, in case of dispute, be determined by the valuation of two referees or their umpire in the usual way: (see the form 1 Con. Prec., Part III., Section III., No. V., clauses 18, 19, and 20, pp. 616, 617, 621, 2nd edit.)

As to smelting ores on the premises.]—Where setts are granted of lead mines, the grantees are sometimes required to enter into a covenant that all the ores raised shall be smelted on the premises; but it is by no means a general

custom, and seldom prevails in any locality in which coals are scarce or dear; or where the mines are situated in a cultivated part of the country, where the working of a smelting-house would be prejudicial to the surface produce of the land: (see the form of conveyance of the above kind, 1 Con. Prec., Part III., Section III., No. VI., clause 146, 628, 2nd edit.)

6. *Provisoes.*

Usual provisoes.]—The usual provisoes in a mining sett are for authorizing the grantor to avoid the sett for non-payment of rents and dues, or for breach of covenant: (see the form 1 Con. Prec., Part III., Section III., No. II., clause 11, p. 584, 2nd edit.) And in some setts the grantees are also authorized to determine the term, in case the mines should turn out to be unproductive. Whenever a clause of this kind is to be inserted, the grantor's solicitor should take care to make this right of the grantees to determine the term conditional upon their giving some certain fixed previous notice to the grantor, and also paying all arrears of rent, and performing all the covenants and agreements on their parts to be paid, observed, and performed: (see the form 1 Con. Prec., Part III., Section III., No. V., clauses 21, 22, pp. 617, 618, 2nd edit.)

Special provisoes.]—In addition to the usual provisoes, special provisoes are sometimes inserted; one of these occurs where in addition to the dues a yearly rent is reserved (as is frequently the case in setts or leases of coal mines or quarries, although not very common in similar grants relating to mines of metals and metallic minerals), and this rent is designed to be suspended in cases where, without any default on the part of the adventurers, the workings of the mine are stopped by fire, water, or any other inevitable cause or accident; but this proviso ought to be qualified by a further proviso, that if the stoppage of the workings is caused by the default of the grantees or adventurers, that all the reserved rents and payments shall still continue payable, in precisely the same manner as if no such stoppage in the workings had ever taken place.

III. Mining Leases.

There is little difference in the wording of an actual lease of mines from that of a licence to search for minerals. The distinction consists in the operative words in the granting

and habendum clauses, which in a lease of mines are the same as those contained in an ordinary demise of lands; but the reddendum clause, covenants and provisoes, are penned precisely in the same form, whether the grant be of a mere licence to search, of an actual lease of the mine itself. The instruments themselves have, however, as we have already remarked, a different operation; a lease conferring an actual property in the minerals themselves; whereas the licence confers no property until they are actually raised, and the grantee has reduced them into his possession: (see the form of leases of mines, 1 Con. Prec., Part III., Section IV., Nos. V. and VI., pp. 608, 609, 2nd edit.)

IV. Setts and Leases of Coal Mines and Quarries.

Setts and leases of coal mines and quarries are penned in much the same manner as those relating to mines of ores and metals; but in setts and leases of coal mines it is a usual practice to reserve a surface rent in addition to a render of the dues or profits of the mine, which is not often done in setts of mines of lead, tin, copper, or other mineral productions: (see the form 1 Con. Prec., Part III., Section III., No. VI., clauses 4 and 5, pp. 612, 613, 2nd edit.) Still, the covenants in both kinds of grants are much the same. These, on the part of a grantee of a coal mine, generally are, for payment of the rent and dues; to carry on the workings in a proper manner, and not to discontinue such workings unless in the case of inevitable accident; to lay aside the earth and soil raised; to secure and keep open pits and shafts; to keep the mines sufficiently drained and supported; to do no act whereby the mines may be damaged or endangered; to fill up pits and shafts upon notice; that lessor shall be at liberty to inspect mines; that lessee will keep a proper weighing machine, and weigh all the coal raised therein; keep proper books of account, to be open for grantor's inspection at all reasonable times; and to leave the mine, at the expiration of the term, with all such fixtures and machinery therein as the grantor may choose to purchase: (see the form 1 Con. Prec., Part III., Section III., No. VI., clauses 6 to 18 inclusive, pp. 613, 616, 2nd edit.)

Usual covenants entered into by lessor.]—The lessor usually covenants for the peaceable enjoyment by the lessee during the term; but sometimes he enters into qualified covenants that he has good right to demise the sett, or grant the lease

for quiet enjoyment and freedom from incumbrances, and for further assurance: (see the form 1 Con. Prec., Part III., Section III., No. VI., clauses 24, 25, and 26, pp. 619, 620, 2nd edit.)

Provisions usually inserted in leases of coal mines.]—The usual provisoes are for re-entry by lessor for non-payment of rent or breach of covenant, and for the entire or partial suspension of the rents and dues, in case of the accidental stoppage of the working of the mine (see the form 1 Con. Prec., Part III., Section III., No. VI., clauses 20, 21, pp. 617, 618, 2nd edit.), to which is sometimes added a clause authorizing the grantees to determine the term in case the mines should turn out unprofitable (*ib.* clause 22), or, in lieu of this clause, either the grantor or grantee is empowered to determine the term upon notice at certain periods; as the first five, ten, fifteen years thereof, or the like: (*id. ib.* note F.)

Arbitration clause.]—It is also very common in grants of the above kind to insert a clause at the end of the deed, stipulating that all matters in dispute concerning anything therein contained shall be referred to the arbitration of two referees or their umpire, whose award shall be made a rule of court, and be binding on all parties: (see the form 1 Con. Prec., Part III., Section IV., No. V., clause 27, pp. 620, 621, 2nd edit.)

Special clauses for purposes connected with the working of the mine.]—In addition to the above clauses, it is a common practice to give the grantees liberty to raise clay from the premises for the purpose of making the bricks for buildings or other purposes connected with the mine; and sometimes authority is given for them to raise and burn limestone, and also to make coke upon the premises: (see form of this kind, 1 Con. Prec., Part III., Section III., No. VI., cluases A., B., and C., pp. 610, 611, *in notis*, 2nd edit.)

CHAPTER IV.

STAMP DUTIES ON LEASES.

When ad valorem duties were first imposed on leases.]—Stamp duties on leases were first imposed by the statute 44 Geo. 3, c. 98, but were afterwards repealed by the statute 48 Geo. 3, c. 149, and other duties substituted in lieu of them. The latter duties were again repealed by the General Stamp Act (55 Geo. 3, c. 184), which were again repealed by the statute 13 & 14 Vict. c. 97, and other duties substituted, as will be seen by the annexed comparative table of the old and new stamp duties, which have also again been partially altered by the more recent enactment, 17 & 18 Vict. c. 83, in the manner we shall hereafter point out.

When a lease is granted in consideration of a fine and a yearly rent.]—Under the General Stamp Act (55 Geo. 3, c. 184), as also under the statute 13 & 14 Vict. c. 97, a lease granted in consideration of a sum of money by way of fine, without any yearly rent, or with a yearly rent under 20*l.*, is charged with the same duty as on a conveyance on the sale of lands for a sum of money for the same amount.

Exception as to leases for lives, &c., and leases of ecclesiastical corporations.]—Save and except a lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives, not exceeding three, by whomsoever granted, and leases for a term absolute, not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole, which, under both the above-mentioned acts, are expressly exempted from the duties on conveyances upon the sale of lands, but, not being exempted from all stamp duty, will require the common deed 1*l.* 15*s.* stamp.

A Comparative Table of Old and New Duties on Leases in England and Scotland.

	Old duty.			New duty.		
	£	s.	d.	£	s.	d.
Not exceeding 5*l.*	1	0	0	0	0	6
Exceeding 5*l.* and not exceeding 10*l.*	1	0	0	0	1	0
" 10 " 15	1	0	0	0	1	6
" 15 and not amounting to 20	1	0	0	0	2	0
Amounting to 20 and not exceeding 20	1	10	0	0	2	0
Exceeding 20 " 25	1	10	0	0	2	6
" 25 " 50	1	10	0	0	5	0
" 50 " 75	1	10	0	0	7	6
Amounting to 75 and not amounting to 100	1	10	0	0	10	0
" 100 and not exceeding 100	2	0	0	0	10	0
Exceeding 100 " 150	2	0	0	5*s.* for every 50*l.*, and for any fractional part of 50*l.*		
" 150 and not amounting to 200	2	0	0			
Amounting to 200 and not exceeding 200	3	0	0			
Exceeding 200 " 250	3	0	0			
" 250 " 300	3	0	0			
" 300 " 350	3	0	0			
" 350 " 400	3	0	0			
Amounting to 400 " 400	4	0	0			
Exceeding 400 " 450	4	0	0			
" 450 " 500	4	0	0			
" 500 " 550	4	0	0			
" 550 and not amounting to 600	4	0	0			
Amounting to 600 and not exceeding 600	5	0	0			
Exceeding 600 " 650	5	0	0			
" 650 " 700	5	0	0			
" 700 " 750	5	0	0			
" 750 and not amounting to 800	5	0	0			
Amounting to 800 and not exceeding 800	6	0	0			
Exceeding 800 " 850	6	0	0			
" 850 " 900	6	0	0			
" 900 " 950	6	0	0			
" 950 and not amounting to 1,000	6	0	0			
" 1,000	10	0	0			

Leases for a less period than a year, how chargeable with stamp duty.]—But under the more recent statute 17 & 18 Vict. c. 83, leases for a less period than a year are now charged with a stamp duty which would be chargeable on a lease at a yearly rent of the same amount as the sum actually reserved as the rent for the time for which the premises are let.

Where a lease is granted in consideration of a fine, and also of a rent.]—A lease granted in consideration of a fine, and a yearly rent of 20*l.* or upwards, is chargeable both with

the *ad valorem* duties on a lease in consideration of a fine, and of a rent only of the same amount.

And by the schedule annexed to the last-mentioned act, a lease for any term of years not exceeding thirty-five, at a yearly rent, with a fine, is charged as follows:

Duties.	If the term shall not exceed 100 years.	If the term shall exceed 100 years.
	£ s. d.	£ s. d.
Where the yearly rent shall not exceed 5*l*.	0 3 0	0 6 0
5*l*. and not exceeding 10*l*.	0 6 0	0 12 0
10 " 15	0 9 0	0 18 0
15 " 20	0 12 0	1 4 0
20 " 25	0 15 0	1 10 0
25 " 50	1 10 0	3 10 0
50 " 75	2 5 0	4 10 0
75 " 100	3 0 0	6 0 0
And where the same shall exceed 100*l*., for every 50*l*. and fractional part of 50*l*.	1 10 0	3 0 0

And where any lease shall be granted in consideration of a fine, and also of a yearly rent, such lease shall be chargeable only, in respect of such fine, with the *ad valorem* duties charged on conveyances under statute 13 & 14 Vict. c. 97.

Leases of mines, and leases where the render is a corn-rent.] —Leases of mines, or where the render is of corn-rents, are brought within the act 13 & 14 Vict. c. 97, which, from the mode in which these reservations were made, were not within the words of the General Stamp Act (55 Geo. 3, c. 184.) But it is now provided (13 & 14 Vict. c. 97, schedule, LEASE) that a lease or tack of any mine or minerals, or other property of a like nature, either with or without any other lands, tenements, hereditaments, or other heritable subjects, where any portion of the produce of such mines or minerals shall be reserved to be paid in money or kind, if it shall be stipulated that the value of such portion of the produce shall amount at least to a given sum per annum, or if such value shall be limited not to exceed a given sum per annum, to be specified in such lease or tack, then the said *ad valorem* duty on leases shall be charged in respect of the highest of such sums so given or limited, for any year during the term of such lease or tack.

Where a yearly sum is reserved in addition to a rent in kind.]—And where any yearly sum shall be reserved in addition to or together with such produce, relative to the yearly amount or value of which produce there shall be no such stipulation or limitation as aforesaid, the said *ad valorem* duty shall be charged in respect of such yearly sum.

Where both a yearly rent and a render in produce is reserved.]—And where both a yearly sum, and also such produce relative to the yearly amount or value of which there shall be no such stipulation or limitation as aforesaid, shall be reserved, the said *ad valorem* duty shall be charged on the aggregate of such yearly sum, and also of the highest yearly amount or value of such produce.

As to corn-rents.]—And with respect to corn-rents, under the general regulations as to leases, "Where, in any of the aforesaid several cases of lease or tack, any fine, premium, or grassum, or any rent payable under any lease or tack, shall consist wholly or in part of corn, grain, or victual, the value of such corn, grain, or victual shall be ascertained or estimated at and after any permanent rate of conversion which the lessee may be specially charged with, or have it in his option to pay; and if no such permanent rate of conversion shall have been stipulated, then, in England and Ireland respectively, at and after the prices upon an average of twelve calendar months preceding the first day of January next before the date of such lease or tack, of the average prices of British corn published in the London Gazette in the manner directed by any act now in force for the commutation of tithes in England and Wales; and such respective values shall be deemed and taken to be the fine, premium, or grassum or yearly rent, or part thereof respectively, as the case may be, in respect whereof the *ad valorem* duty shall be charged as aforesaid."

As to leases by joint tenants, coparceners, or tenants in common.]—In order to settle any question that might arise as to whether, in the case of leases by joint tenants, coparceners, or tenants in common, where there is a several demise, and a several reservation of rent payable to each, as many stamps as demises might not be required, the act expressly provides that, "Where separate and distinct fines, premiums, or grassums shall be paid to several lessors, being joint tenants, tenants in common, or coparceners, in England or Ireland, or proprietors *pro indiviso* in Scotland, who shall

by one and the same deed or instrument jointly or severally demise or lease the lands, tenements, hereditaments, or heritable subjects of which they are such joint tenants, tenants in common, or coparceners, &c., or where separate and distinct rents shall be by one and the same deed or instrument reserved or made payable, or agreed to be reserved and made payable to the lessor or to several lessors, being such joint tenants, tenants in common, or coparceners, &c., the *ad valorem* duty shall be charged in respect of the aggregate amount of such fines, premiums, or grassum, and of such rents respectively."

Relief from penalty in certain cases.]—The act 13 & 14 Vict. c. 97, also affords relief from penalties which had been incurred by a misapprehension that existed amongst many of the profession, that where leases were granted upon or after sales made in consideration of money paid to some other person than the lessor no *ad valorem* duty would become payable; in consequence of which, leases were often granted under the above-mentioned circumstances without being impressed with any *ad valorem* stamp whatever, a course of proceeding that was at length decided to be illegal: (*Attorney-General* v. *Brown*, 18 L. J. Rep. (N. S.) 336, Exch.) But the above-mentioned act relieves the parties preparing such instruments from all penalties with respect to past transactions (sect. 10); and with respect to the future *ad valorem* stamps, it is provided in the schedule annexed to the said act (tit. LEASE), "That where any person having contracted for, but not having obtained, a lease of any lands or other property, shall contract to sell such lands or other property, or any part thereof, or his right or interest therein or thereto, to any other person, and a lease shall accordingly be granted to such other person, the purchase or consideration money which shall be paid or given, or agreed to be paid or given to the person immediately selling to such lessee, shall be set forth in such lease, and such lease shall be charged as well with the *ad valorem* duty on such purchase money or consideration, as with the duty on the purchase money or consideration, or rent paid or reserved to the lessor."

As to leases not otherwise charged.]—A lease not otherwise charged is charged with a duty of 1*l.* 15*s.*, and it is then provided, "that no *ad valorem* duty shall be chargeable in respect of any penal rent, or increased rent in the nature of a penal rent, reserved in any such lease as aforesaid."

As to penal rents.]—The clause with respect to penal rents in the act 13 & 14 Vict. c. 97, was probably inserted to remove a doubt that existed amongst the profession as to whether, in the event of such additional rent becoming payable by the lessee incurring the penalty, the lease would require to be impressed with a proportional stamp, a point which never appears to have been judicially decided.

As to leases within the exception of the second section of the Statute of Frauds.]—We have already noticed that leases within the exception of the second section of the Statute of Frauds are not required to be in writing; but, although not required so to be, if such leases actually are made in writing, then the same stamps will be required for them as for any other lease for a term of years: (*Prosser* v. *Phillips*, Bull. N. P. 269.)

As to duplicates or counterparts.]—Under the General Stamp Act (55 Geo. 3, c. 184), prior to the act 13 & 14 Vict. c. 97, counterparts of leases charged with a duty not exceeding 1*l.* were charged with the same duty as an original lease, and where it exceeded that amount, with a duty of 1*l.* 10*s.*, and a progressive duty of 1*l.* But under the latter enactment (schedule, tit. DUPLICATE or COUNTERPART), the duplicate or counterpart of any deed or instrument of any description whatever, chargeable with any stamp duty, either under that schedule or any other act or acts then in force, where the stamp duty or duties chargeable as aforesaid, exclusive of progressive duty, shall not amount to the sum of 5*s.*, the same duty is imposed as shall be chargeable on the original deed or instrument, including the progressive duty thereon (if any.) And where the same (exclusive as aforesaid) shall amount to the sum of 5*s.* or upwards, the sum of 5*s.* Such duplicate or counterpart, however, was required to be stamped with a denoting stamp for testifying the payment of the proper duty on the original deed; but a more recent enactment (16 & 17 Vict. c. 59), after reciting that it was expedient to dispense with such denoting stamp, provides that, notwithstanding anything contained in the said act (13 & 14 Vict. c. 97), the counterpart of any lease being duly stamped with the said stamp duty of 5*s.*, or any higher stamp duty, exclusive of progressive duties, and not being executed or signed by or on behalf of any lessor or grantor, shall be available as a counterpart, without being stamped with a particular stamp for denominating or testifying the payment of the stamp duty payable on the original lease.

Licences to demise copyholds.]—With respect to licences to demise copyholds, by the schedule annexed to the above-mentioned act (17 & 18 Vict. c. 83) such licence to demise, or a memorandum thereof, if made out of court, and the copy of court roll of such licence if made in court, where the clear yearly value of the estate to be demised shall be expressed in such licence, and shall not exceed 75*l.*, the same duty as on a lease at a yearly rent equal to such yearly value under the act 13 & 14 Vict. c. 97. And in all other cases, a duty of 10*s.*

What leases exempt from all stamp duty.]—The act 13 & 14 Vict. c. 97, expressly provides that nothing therein contained shall charge with stamp duty any deed or instrument expressly exempted from stamp duty by existing acts. These, as far as leases are concerned, take in only leases of waste or uncultivated land to any poor or labouring persons for any term not exceeding three lives, or twenty-one years, where the fine shall not exceed 5*s.*, nor the reserved rent 1*l.* 1*s.* per annum, and the counterparts or duplicates of all such leases. Neither does this exemption extend to a building lease, which, notwithstanding the rent be less than 1*l.* 1*s.*, must nevertheless be stamped in like manner as an ordinary lease: (*Doe d. Hunter* v. *Boulcot*, 2 Esp. N. P. C. 595.)

CHAPTER V.

ATTORNMENTS.

As the statute of 4 Anne, c. 16, has dispensed with the necessity of an attornment in most cases, an act of this kind is not very often entered into. Where it usually occurs is where a party, who has been out of possession of the property, upon making his claim requires the tenants in possession either to attorn to him and acknowledge the subsisting relationship of landlord and tenant, or to render up the possession altogether; or it is sometimes done by a mortgagee, after forfeiture, either for the purpose of getting into the receipts of the rents and profits, or as a means of acquiring possession of the mortgaged premises, without resorting to his remedy by actual entry or ejectment. In a case of the latter kind, therefore, where a mortgagee does not desire to disturb the tenancy of the lessees, it is usually arranged that the latter shall attorn tenant to him, at the rent reserved by the lease, in order to establish a relationship of landlord and tenant between them.

As to lessees holding under leases granted prior or subsequent to the mortgage.]—If the tenant holds under a lease granted subsequently to the mortgage, then an attornment is absolutely necessary to establish the relationship of landlord and tenant between him and the mortgagee, and without which the latter will have no power to distrain for any rents accrued during the term (*Rogers* v. *Humphreys*, 4 Ad. & Ell. 313; *Partingdon* v. *Woodcock*, 6 ib. 690), although he may treat him as a trespasser, and eject him from the premises without any previous notice whatever: (*Keech* v. *Hall*, Doug. 21.) But where the demise to the tenant is prior to the mortgage, then a mortgagee, as incidental to his estate, upon giving notice to the tenant to pay him the rents,

may distrain upon him without any act of attornment whatever; the notice operating as an attornment at common law, and this relating back to the time of the grant, and taking in all rents due from the tenant at the time of such notice, and not actually paid over to the mortgagor: (*Doe* v. *Boulter*, 1 New. & Per. 650.)

The instrument of attornment is a very concise and simple one. By this the tenants in the occupation of the lands acknowledge their tenancy to the legal owner thereof. It usually states that the tenant, or several tenants, whose names are thereunto subscribed, being the tenant or several tenants in possession of the premises, do attorn and become tenant or tenants of the same premises to such legal owner, showing, at the same time, how the latter is entitled to the property; as by a certain indenture, &c. whereby the premises were conveyed to him in fee, or by descent from some deceased ancestor, or otherwise, as the case may be; the tenants then undertaking to pay the rent in respect of the premises whenever the same shall become due, in testimony whereof some small nominal pecuniary consideration (as 1*s*. for instance) is then expressed to be paid in confirmation of the agreement, and in part of the said rent payable from them to such owner of the lands in respect of the said estates of the tenements thereon: (see the form 1 Con. Prec., Part III., Section V., No. I., p. 635, 2nd edit.)

Where several tenants attorn at the same time.]—If, as frequently happens, several tenants attorn at the same time, the attornment of the whole of them may be contained in the same instrument. In this case, the best plan is to annex a schedule to the instrument, setting out the tenants' names, the names of the several tenements, with their local situation, the amount of yearly rent reserved, and the times at which such rents are payable: (see the form 1 Con. Prec., p. 636, 2nd edit.)

Attornments from mortgagor to mortgagee.]—In mortgage transactions it is sometimes arranged that the mortgagor shall attorn tenant to the mortgagee. This is done by a very concise form, by which the mortgagor attorns tenant to the mortgagee at a yearly rent, being the same amount as the reserved interest, to be paid either half-yearly or quarterly, on certain stated days in every year during the continuance of the mortgage security: (see the form 1 Con. Prec., Part III., Section V., No. III., p. 639, 2nd edit.)

Attornment clause improper in mortgages under Building Societies Act.]—It was formerly a very common practice in mortgages effected under the Benefit Building Societies Act to insert in the mortgage deed an attornment clause, by which the mortgagor attorned as tenant to the trustees of the society at a yearly rent, the mortgagor at the same time being permitted to hold and enjoy the premises, and to receive and take the rents and profits thereof until default; but in a case which came before the Court of Common Pleas a few years since (*Walker* v. *Giles and Fort*, 14 L. T. Rep. 41), it was held that such a clause was inconsistent with the nature of the assurance, from whence it seems improper to insert a clause of this kind in any mortgages of the above description.

Form of attornment from a tenant whom mortgagee has recovered against in ejectment.]—It sometimes happens that where a mortgagee has recovered in ejectment against a tenant, that it is arranged between them that the latter shall be permitted to continue in possession upon his attorning tenant to the mortgagee. The instrument for this purpose ought to recite the fact that the mortgagee has obtained judgment in the action brought against the tenant for the possession of the mortgaged premises, a particular description of which, corresponding with the parcels described in the judgment, should be here set out, and then stating how the mortgagee became entitled to such premises, as by a certain indenture, dated, &c. (setting out shortly the mortgage deed), the tenant then attorns tenant, and agrees to pay the reserved rents to the mortgagee, and to deliver up possession of the premises to him on the expiration of the term: (see the form 1 Con. Prec., Part III., Section V., No. IV., p. 640, 2nd edit.)

Attornments.]—A simple act of attornment to the persons legally entitled to the reversion requires no stamp, either as an agreement, or as an instrument not otherwise charged, an act of this kind never having been deemed of sufficient consequence to occupy a place in the schedules: (*Doe d. Wrighte* v. *Smyth*, 8 Ad. & Ell. 255.) But if an attornment be made to persons having no right to the property, such an instrument will be inadmissible in evidence unless stamped as an agreement; and it has recently been held, that although a mere memorandum of attornment required no stamp, yet that if it proceeded to state the amount of rent, and the mode of payment, it became an agreement, and as such was

chargeable with stamp duty accordingly: (*Frankis* v. *Frankis*, 3 Per. & Dav. 565.)

Practical suggestions.]—The safest course will therefore be in all cases to stamp the instrument with an agreement stamp; for an instrument of this kind can never be effectual unless both the time and mode of payment, and the amount of rent to be so paid, be fully set out in it.

CHAPTER VI.

EASEMENTS.

Easements, how usually granted.]—Easements are usually granted and contained in the same conveyance with the property to which they appertain, wherein they are included either in express terms, or pass as appurtenant to the dominant tenement itself, which, whether it be conveyed in fee or for any less estate, will carry with it all the rights which the conveying party enjoyed by virtue of, and as appendant to, his estate, as against third parties: (11 Hen. 6, 22, pl. 19; *Fentiman* v. *Smith*, 4 East, 107.) But some particular kinds of easements, such as rights of way, or the use of a drain, or watercourse, are not unfrequently granted separately, and apart from the dominant tenement, and not unfrequently by parties claiming under a title perfectly distinct from that of the person through whom the grantor derives his title to the tenement itself upon which the privilege is to be conferred.

By what assurance the grant must be made.]—Whatever opinions may formerly have been entertained upon the subject, it is now clearly settled that the grant of an easement can only be made by an instrument under seal (*Cocker* v. *Cowper*, 1 Cr. Mees. & Ros. 418); for if made by parol, it will be a mere licence liable at any time to be revoked by the party who gave it, notwithstanding the licencee, upon the faith of such licence, may have expended heavy sums in the exercise of the privilege professed to be conferred; as where a commoner with the licence of the lord builds a cottage on the waste, which the latter afterwards revokes, as he lawfully may whenever he thinks proper (*R.* v. *Inhabitants of Harrow-on-the-Hill*, 4 M. & S. 565.) All, it seems, a party can confer by a parol licence,

and which when executed will be binding upon him, is to relinquish some easement which he himself has acquired in addition to the ordinary rights of property, and thus restore his neighbour's property to its original and natural condition; but he cannot by such means impose any burthen upon land in derogation of such ordinary rights of property (Gale & What. on Easements, 43); thus, for example, if any neighbour has, by grant or prescription, acquired a right to ancient lights overlooking my property, and he gives me a parol licence to build in front of them on *my own land*, and I build accordingly, this licence, when thus executed, will be valid and irrevocable, whilst a similar permission to turn a spout upon *his land* from a neighbouring house will be invalid and revocable; and it must also be remembered that, even in the first instance, in order that the licence may become a binding one, it is essential that the act licenced to be done should be actually performed, and that the necessary consequence of such execution should be, *per se*, the extinguishment of the right; for the cases do not appear to furnish any authority for saying that where the extinguishment of an easement would depend upon a repetition of the licenced acts, a parol licence would be sufficient to effect it; and, indeed, where the acts from their nature lie in repetition, such licence could not be executed: (*ib.*)

Easements which are usually granted by separate instruments.]—The usual easements which are granted by a separate instrument from the conveyance are grants of right of way, or to construct or use drains or watercourses.

How grant of right of way is usually penned.]—When a right of way is granted separate and apart from the dominant tenement, the deed of grant commences in the usual manner with the date and names and description of the parties; and recitals being seldom introduced, the testatum clause follows immediately after, by which, for the consideration therein mentioned, the grantor grants the right of way, setting out the nature of it, and in what way, and by what persons it is to be enjoyed, and also the purposes for which it is to be used.

Propriety of restricting the right where the grant is to operate as a covenant running with the land.]—It has been rather a common practice where an extensive right of this nature has been intended to be conferred, to extend the

right of way "*for all purposes whatsoever;*" but as it has recently been held that such an extension of the grant is more ample, and comprehends using the road for purposes unconnected with the enjoyment of the land; the consequence of which is that a covenant for such enjoyment will not run with the land, or entitle an assignee to any benefit under it: (*Ackwyd* v. *Smith*, 19 L. J. (N. S.), 315, C. P. 1850.) It will be proper in all cases where the grant is not intended to be merely personal to the grantee, to restrict the right of way to purposes connected with the enjoyment of the land, which is only a right to pass and repass to and from it; for in order to make a covenant run with the land, it must be of such a nature as to inhere to and concern the land itself, and the mode of occupying it; but if unconnected with the enjoyment or occupation, it cannot be annexed as incident to it; nor can a way appendant to a house be granted away or made in gross; for no one can have such a way, but he who has the land to which it is appendant (Bro. Abr. "Grant," pl. 180), and if a way is granted in gross only, it is personal and cannot be assigned.

Particulars to be attended to in granting a right of way.]—The most important points to be attended to in preparing the grant of a right of way are: 1. to describe the kind of way intended with sufficient distinctness to show, beyond all possibility of doubt, what extent of right is to be conferred; as whether it is to be a footway, a horseway, a carriage way, or a drift way; 2. to point out with precision its length, breadth, course, and direction; and 3. to state at whose expense the way is to be kept in repair: (see the form of a grant of a right of way, 1 Con. Prec., Part II., Section V., p. 405, 2nd edit.)

Propriety of expressly stipulating by whom the repairs are to be made.]—The grantee generally undertakes to keep the way in repair at his own charges, and this is in accordance with the general rule, that whenever a right of way is granted the grantee ought to keep it in repair, upon the long established principle, that "he who hath the use of the thing ought to repair it," and thus according with the rules of the civil law, which imposes the burthen of repair in cases of easements upon the owner of the dominant, and not upon the owner of the subservient, tenement: (*Gerrard* v. *Cooke*, 2 Bos. & Pull. N. R. 103.) Still, for all this, a grantor of a right of way may be bound, either by express stipulation, or by prescription, to repair it; and hence the propriety of expressly stipulating by whom, and at whose expense, these

repairs are to be made; for however clearly it may be established that the grantor of a right of way, in the absence of any such stipulation or prescription, is not bound to repair it (*Osborne* v. *Wise*, 7 Car. & Pay. 761), it by no means follows that this obligation is thereby cast upon the grantee: (*Lowther* v. *Cavendish*, 1 Ed. 99; and Gale and Whatley on Easements, 308.)

Curious points relating to rights of way recently discussed.] —Some curious points relating to rights of way were discussed in the late case of *Pinnington* v. *Galland* (22 L. T. Rep. 41), which it may not altogether be irrelevant to mention here. In the case alluded to, A., seised in fee of five closes of land, sold them to different purchasers. The conveyances were all executed on the same day, but the order of execution could not be ascertained. None contained any special grant of any right of way; but at the time of the conveyance a way was in use from the high road over one of the closes to another of them purchased to B., whose conveyance contained the words, "together with all ways to the said closes belonging." B. took possession and used the way, but afterwards, on a sale by him to C., D. obstructed the way. There was no access to the close from the public road, except the way in question, and one other way more circuitous and less commodious, which at a former time had been specially granted to the purchaser of a close lying above that of the plaintiff, and which went over the lands of other persons. The questions were, is the defendant entitled to obstruct the way? Did it pass by the conveyance? It was held that the plaintiff was entitled to the way by implied grant, if his conveyance was first executed —by implied reservation, if the defendant's was executed first.

Where the right to soil, as well as of the way, is also granted.] —Generally speaking, in grants of rights of way, the easement or right is alone conferred, the grantor still retaining the ownership of the lands through which it runs; but in some instances, particularly where a tram or railroad is to be constructed by the grantee, leading to and from a mine, quarry, or manufactory, an actual grant of the land itself is is also conferred. This grant is generally made by way of demise at a yearly rent for a term of years, the lessee undertaking to construct the way in a sufficient manner, and so to keep and leave the same at the expiration of the term:

(see the form 1 Con. Prec., Part II., Section V., No. XIII., p. 412, 2nd edit.)

Reservations and powers which are usually limited to grantors.]—The grantor usually reserves a right of entry for the purpose of viewing the condition of the repairs, and it is also usual to provide that he may have the option of taking any of the machinery at a valuation at the end of the term, and that in case of his declining to do so, the lessee may remove the same for his own benefit: (see the form 1 Con. Prec., Part II., Section V., No. XIII., clauses 11 & 12, p. 415, 2nd edit.) A power of distress for the rent may also be inserted (*ib.* clause 13); and the instrument usually concludes with a proviso for avoiding the grant for breach of covenant by the grantee: (*ib.* clause 14.)

Where the exercise of the right is to be limited to the grantees only.]—If the exercise of the right of way is to be limited to the grantees only, it will be necessary to insert a clause to the effect that the grantees will not suffer any other persons, except their own servants and workmen, or other persons in their actual employ, to use or exercise the right of way without the grantor's written authority so to do: (see the form 1 Con. Prec., Part II., Section V., No. XIII., clause A., *in notis*, p. 412, 2nd edit.)

Where the right is to be free from all restraint.]—But, generally speaking, a right of the above kind is an unrestricted one, and where this is the case, it is a constant practice for the grantees to grant a licence to exercise this right to other parties. In this grant, the extent to which the right is to be exercised ought to be distinctly stated, as also all the purposes for which it is to be used. The grantee should covenant for the peaceable enjoyment of the way by the grantor in common with the grantee; that the latter will do as little damage as possible to the way, and contribute to the repair; the grantor on his part covenanting that the grantee shall peaceably enjoy the right; to keep the way in repair; and to pay all rates and taxes: (see the form 1 Con. Prec., Part II., Section V., No. XIV., p. 417, 2nd edit.)

Release of right of way.]—Where a right of way which has been granted is intended to be released by the grantee, so that the right may be totally avoided and destroyed, the deed of release should recite the grant, and the agreement

on the part of the grantee for its relinquishment, which he should then release to the grantor for the purpose of extinguishing the same. It is also usual to add covenants from the grantee that he has good right to make the release, and for further assurance, if so required by the releasee: (see the form 1 Con. Prec., Part II., Section V., No. XII., pp. 409, 410, 2nd edit.)

BOOK THE FOURTH.

SETTLEMENTS AND TRUST DEEDS, APPOINTMENTS IN EXERCISE OF POWERS, DEEDS OF PARTITION, PARTNERSHIP DEEDS, AND COMPOSITION DEEDS FOR THE BENEFIT OF CREDITORS.

CHAPTER I.

MARRIAGE ARTICLES.

I. General Practical Observations.

Marriage settlements are effected either by articles of agreement, or by a formal deed of settlement; the first-mentioned mode, however, is rarely relied upon as a final arrangement, but merely as a preliminary course, like a contract preceding a purchase, till a more formal document can be prepared; for so long as the settlement rests upon

the articles only it confers a mere equitable security, which is liable to be defeated altogether by a subsequent conveyance to a purchaser for valuable consideration, who has no notice of such prior settlement. The chief aim of the marriage articles, therefore, is to set out the heads and various objects of the intended settlement, which are afterwards to be carried into effect by a more complete instrument; so that in by far the greater number of instances, particularly where the property is inconsiderable, it is usual to dispense with the articles altogether, and prepare the deed of settlement itself in the first instance.

By whom marriage settlements are usually prepared.]—Marriage settlements are usually prepared by the solicitor of the intended wife, and afterwards approved of by the solicitor of the intended husband; but this, though the most regular course, has not been universally adopted, it being a very common practice for the solicitor of whichever party the property intended to be settled belongs to to prepare the settlement, which is then settled and approved by the solicitor of the other party, although it not unfrequently happens that the same solicitor, and no other, is employed on behalf of both of the parties.

Duties of solicitor in preparing settlement.]—The duties of a solicitor in a transaction of this nature are very similar to those he has to discharge in the case of a sale or mortgage. He must ascertain that the parties have the power to settle the property; he must discover the manner in which it is intended to be settled; and then adopt the proper modes of assurance by which the objects of the settlement can be best carried out.

Marriage settlements valid as against creditors.]—Settlements, if made in pursuance of articles entered into before marriage, are equally good as against creditors and every one else, whether the deed of settlement itself be executed prior or subsequent to the marriage (*Bovy's case*, 1 Ventr. 193; *Russell* v. *Peacock*, 2 R. & M. 285; *Brown* v. *Carter*, 5 Ves. 862), and this without any reference as to whether the settlor was or was not indebted at the time of the settlement: (*Campion* v. *Cotton*, 17 Ves. 263.) And it has recently been determined that even agreements in consideration of marriage, and to settle subsequently acquired property, will be good against creditors, notwithstanding the settlor was actually indebted at the time such agreement

was entered into (*Hardy* v. *Green*, 14 L. T. Rep. 866; stat. 18 Eliz. c. 5; *Turner's case*, 3 Rep. 816; *Lush* v. *Wilkinson*, 5 Ves. 384; *Richardson* v. *Smallwood*, 18 Ves. 55; *Townsend* v. *Westacott*, 2 Beard. 340); but the settlor may defeat it whenever he pleases by a subsequent conveyance to a purchaser for valuable consideration, notwithstanding the latter has express notice of the prior settlement: (25 Eliz. 54; and see 1 Cox Prec. p. 786 n, and the cases there referred to.) An instrument of the latter kind, therefore, is not classified as a marriage settlement, but as a mere voluntary assurance, which will be treated of in a subsequent chapter devoted to the consideration of that particular subject.

Requisites to the validity of marriage articles.]—Marriage articles, like agreements for the purchase of real estates, are required to be in writing, signed by the party to be charged therewith, or by some other person lawfully authorized by him (29 Car. c. 3, s. 4), but, like an agreement of the latter kind, marriage articles may be established through the medium of a correspondence carried on by a series of letters provided the terms are sufficiently full and distinct (*Randall* v. *Morgan*, 12 Ves. 57), and if articles are intended to be reduced into writing, which intention is prevented by the fraud of one of the parties, equity will oblige the fraudulent party to perform it; so, where there has been a part performance of an unsigned or unwritten agreement, as where a wife has been permitted, under such an agreement, to enjoy the interest of a certain sum for her separate use during the marriage, a court of equity will enforce a specific performance of it: (*Taylor* v. *Beach*, 2 Ves. 297; see also *Cook* v. *Mascell*, 2 Ven. 200.) But marriage itself will not constitute a part performance: (*Brownsmith* v. *Gilbourne*, 2 Str. 738; *Montacute* v. *Maxwell*, 1 P. Wms. 618.)

Court of equity will depart from strict legal rules of construction in carrying marriage articles into execution.]—Courts of equity, in carrying marriage articles into execution, will depart from the strict rule of legal construction to effectuate the manifest intent of the parties; hence, as equity holds the main intention of marriage settlements to be a provision for the issue, when the words used in the articles would have conferred an estate tail in the settlor, which he might have defeated by barring the entail, and thus deprive the issue in tail of all benefit under the settlement, the court, in carrying the articles into execution, have directed a

strict settlement by cutting down the settlor's estate tail to a life estate only: (*Trevor* v. *Trevor*, 1 Eq. Ca. Abr. 387; S. C. P. Wms. 622: *Crusack* v. *Crusack*, 1 Bro. P. C. 470; *Highway* v. *Banner*, 1 Bro. C. C. 584.) In carrying out the articles also, daughters, though not expressly named therein, will yet be included under the general term issue, which, in point of fact, is just as applicable to them as to sons; and, in the execution of the articles, estates will be decreed to be limited to them accordingly: (*Hart* v. *Middlehurst*, 3 Atk. 371.) Still, notwithstanding the liberal construction which courts of equity are always to adopt in order to carry out the intent of the parties to the utmost limit which the rules of law and equity will permit, the articles ought, nevertheless, to be so penned as to leave no doubt as to the intent of the parties, which should be expressed in the proper technical terms, and thus avoid all necessity for calling in the aid of the court to carry out any of the intended objects.

II. Of the Preparation of Marriage Articles.

1. General Practical Directions.
2. As to Strict Settlements.
3. As to Ordinary Settlements.

1. *General practical Directions.*

Marriage articles ought to commence with the date and description of the parties, in the same manner as in an ordinary deed of conveyance. Amongst these, the settlor of the property, whoever he or she may be, whether the intended husband or the intended wife, or the father, mother, grandfather, or other relative of either of them, should always be named as the party of the first part; the intended wife, or the intended husband, whichever it may be, who is to take under the settlement, should be the party of the second part; and where the consent of any third parties, as parents or guardians, &c., is necessary, they should be the next parties named, and then the trustees of the settlement. Sometimes, however, two or more sets of trustees will become necessary, particularly in cases of strict settlement of real estate, and for providing portions for younger children, a subject we shall enter upon more fully when we come to treat upon the latter mode of assurance.

Recitals.]—Few, if any, recitals are generally introduced into marriage articles, beyond the recital of the intended

marriage. Where they are introduced, it is usually for the purpose of showing the extent of interest the settlor takes in the property, or to show the power he has of making the settlement, as in the case of lands limited to a tenant in tail with powers to settle a jointure on a wife, in which case the deed creating the entail and limiting the power ought to be recited; and, if the articles are made in consideration of a mutual settlement, recitals of the deeds or agreements for effecting it should be introduced, but this may be done very briefly.

How the terms of the articles should be set out.]—The articles next proceed to state the agreement between the parties that a settlement is to be made, whereby the property, which should be accurately described in this place, is to be settled, and the mode in which it is to be settled is next pointed out. This should always be done with the strictest technical accuracy; for although courts of equity will allow the introduction of all such clauses in a settlement as are necessary to give it effect, although there is no direction respecting them, or even a misdirection as to the order in which they are to be placed, still, this affords no excuse for penning the articles in a loose and slovenly manner, which may possibly involve the parties in expense and a great deal of trouble, which a very little attention on the part of the solicitor might have effectually prevented. To carry out this object properly, therefore, all the limitations intended to be contained in the settlement should be inserted in the articles in precisely the same order as that in which they are intended to occur in the former instrument.

2. *As to strict Settlements.*

How articles for a strict settlement should be penned.]—In the ordinary form of a strict settlement, where the property is intended to be settled on the intended husband for life, and the intended wife is to have a rentcharge for her jointure in case she survives him, with remainder to the children of the marriage in tail, with power to raise portions for younger children, to grant leases, and with the usual powers of sale and exchange. The proper way to pen the articles, in order to carry out all these objects, will be to stipulate—

1. *As to the limitation of estate to the trustees.*]—That the settled property is to be conveyed and assured unto the

trustees to uses (*naming them*) and their heirs, TO THE USE of the trustees of term (*naming them*), (who must be different persons from the trustees to uses), their executors, administrators, and assigns, for a long term of years; as 500 or 1000 years, for instance, upon the trusts therein mentioned.

2. *As to limitation to intended husband.*]—That, subject thereto, the property is to be TO THE USE of the intended husband for life, without impeachment of waste.

3. *Settlement of rentcharge by way of jointure.*]—That, after his decease, intended wife is to receive a rentcharge by way of jointure out of the settled premises; stating at the same time the periods of payment, as quarterly, half-yearly, or otherwise, and also that she is to have the usual powers of distress and entry for securing the due payment thereof.

4. *Limitation of estates tail.*]—The articles should then set out the manner in which the estates tail are to be limited; as, whether in tail general, in tail male, in special tail or otherwise, and also whether, if daughters are to take, they are to take successive estates tail, or as tenants in common in tail; and in the latter case, if cross remainders, as is almost universally the case, are intended to take place between them, it should be so stated in the articles, and the clause should wind up, by declaring to whom the ultimate remainder is to be limited.

5. *As to portions for younger children.*]—Next should come the agreement with respect to raising the portions for younger children, and, if the consent of the parents is necessary, it must be so stated; as also the precise amount authorized to be raised, the proportions in which it is to be divided, and the particular mode by which this is to be effected; as by sale or mortgage, or how otherwise; as also whether the parents, or either of them, are to have a power of apportioning the amount which such younger children are to take; as also what provisions for maintenance of such children are to be inserted.

6. *As to powers of leasing.*]—If powers of leasing are to be granted, the term for which the property is to be let should be mentioned; and if, as is almost always intended, the power of leasing is intended to be restricted to granting of leases in possession only, it should be so stated in the articles.

As to powers of sale and exchange.]—It will also be proper to stipulate that the trustees of uses are to have power to sell and exchange the settled premises, or any part of the same, for other premises, and to invest any money arising from such sale, or given for equality of exchange, that may at any time remain unappropriated in their hands, in real or Government securities, with the usual power of varying securities; but upon trust for the persons beneficially entitled to the premises to be purchased or taken in exchange as aforesaid. If any of the settled premises, or any part of them, consist of an undivided estate, then, in addition to the powers of sale and exchange, it will be necessary to add a power to make partition also; for although, under a clause directing all usual powers and provisions, powers of sale and exchange will be directed to be inserted in the settlement (*Peake* v. *Penlington*, 2 Ves. & B. 311), still, a power of sale will not authorize a partition, and it is doubtful, also, whether a power of sale will do so (*McQueen* v. *Farquar*, 11 Ves. 467; *Attorney-General* v. *Hamilton*, 1 Mad. 214; *Abel* v. *Heathcote*, 2 Ves. jun. 98); so doubtful, indeed, that in a recent case, when a deed contained a power of sale and disposition and exchange of lands, together with provisions for effecting the sales, exchanges, or dispositions aforesaid, and also a direction to the trustees for a sale of the property to apply the money received for such equality, exchange, or partition in a specific manner, and the parties interested in the property executed a deed intended to effect a partition, the court held, on a purchaser objecting to the title on the ground that the above power did not authorize a partition, that the point was too doubtful a one to enforce the title upon an unwilling purchaser: (*Bradshaw* v. *Fane*, 27 L. T. R. 25.)

Power to appoint new trustees.]—The articles should wind up and conclude by providing that the settlement is to contain a power to appoint new trustees, and all other usual powers contained in settlements of a like nature: (see the form 1 Con. Prec., Vol. I., Part IV., Section I., No. II., pp. 650, 652, 2nd edit.)

8. *As to provisoes for defeating any of the settled estates.*] —Any provisoes which are intended to defeat the settled estates upon the happening of any contingent event, such as the bankruptcy or insolvency of the intended husband, should be provided for in the articles, otherwise its insertion in any settlement executed after the marriage would not be justified.

And here it becomes essential to remark, that it is only the property of the intended wife that can be settled so as to prevent the operation of the Bankrupt Laws; unless the intended husband has obtained property from his intended wife to an equal amount, in which case his own property to the same amount may be so settled as to go over from him in case of his bankruptcy or insolvency (*Higginson* v. *Holme*, 19 Ves. 88; *ex parte Hinton*, 14 Ves. 498; *ex parte Young*, 3 Mad. 124); but in order to enable the trustees to prove under the bankruptcy, the settlement must be stated to be made in consideration of the wife's fortune: (*ex parte Taaffe*, 1 Gl. & Ja. 110.) Nor will the settlement be effectual beyond the extent of the wife's fortune: (*Lockyear* v. *Savage*, 2 Stra. 947; *in re Meaghan*, 1 Sch. & Lef. 179; *ex parte Cooke*, 8 Ves. 353.)

Power of revocation will vitiate the settlement.]—If the settlement contains a general power of revocation over the whole or a greater portion of the settled property, it will be absolutely void as against strangers under the statute 27 Eliz. c. 4, s. 15 (*St. Saviour's case*, Lane, 21, 22); and the effect will be the same, notwithstanding the power be released or extinguished before the settlor makes a subsequent sale: (*Bullock* v. *Thorn*, Moor, 617; *Tarbuck* v. *Marbury*, 2 Vern. 510.) It must be remembered, however, that the above-mentioned statute does not extend to personal estate; neither will a power of revocation avoid the instrument where the power is of a nature to make the instrument more complete, and more thoroughly to carry out the real objects of the settlement, as powers to revoke the old uses, in the sale and exchange clauses commonly inserted in deeds of settlement: (*Buller* v. *Waterhouse*, 3 Keb. 751; *Leigh* v. *Winter*, T. Jones, 411; *Lavender* v. *Blackstone*, 2 Lev. 146; *Doe* v. *Martin*, 4 T. R. 39.) And if the power of revocation is not a general one, but depends upon the consent of some person or persons over whom the settlor has no control, such power will not invalidate the settlement. Neither will a limited power of mortgaging have that effect: (*Jenkins* v. *Keymis*, 150) But if the settlement confers a general power of mortgaging, or of leasing on fines, these are construed to be general powers of revocation, and will avoid the whole settlement: (*Lavender* v. *Blackstone*, *supra*; *Tarbuck* v. *Marbury*, 2 Vern. 511.)

Power to change trustees.]—Power to change trustees is not often inserted in marriage articles, which, being for a

mere temporary purpose, does not often render it likely that such power will have to be exercised. Still, if any considerable time is likely to elapse before any settlement is made, or the trustees are likely to have any immediate duties to perform, it will be advantageous to insert a power of this kind.

3. *As to ordinary Settlements.*

In ordinary settlements in favour of the intended husband and wife, and the issue of the intended marriage, it should be clearly stated what estates and interests are to be limited.

As to powers of appointment.]—Any powers of appointment intended to be reserved, should be clearly expressed. If the intended husband and intended wife, or either of them, are to have a power of appointment in favour of their issue, it should be stated whether the power is to be a joint one, or whether the privilege is to be confined to one only; and if the privilege is to be conferred upon the intended wife only, unless otherwise intended, it should be stipulated that she is to exercise it as well when covert as sole; also whether, in the case of a joint power, it is to be exercised by the survivor, and, if so, whether the survivor is to exercise such power as well by will as by deed.

As to the limitations in default of appointment.]—Limitations in default of appointment should then be inserted, in the same order in which they are to occur in the deed of settlement: (see the forms 1 Con. Prec., Part IV., Section I., Nos. II. and III., pp. 653, 655, 2nd edit.)

As to intended wife's pin money.]—If any allowance is to be settled on the intended wife by way of pin money, the precise amount should be stated, and if it is to be charged upon any particular portion of the settled property, such property, and the mode in which the charge is to be made, ought to be clearly defined.

Limitations or trusts in favour of children or issue.]—In the clauses relating to the limitations or trusts in favour of the children or issue of the marriage, the proportions which they are to take in the settled property, and the time at which their shares or portions are to become vested, should be clearly expressed; as also whether the trustees are to have a power to make any advancement out of the settled property for their maintenance and advancement during minority,

or before a vested interest has been acquired, and, if so, the amount which may be so applied.

As to copyholds.]—If any of the settled property consists of copyhold estates, it should be stipulated that they shall be surrendered to the use of the trustees of the settlement. This ought always to be done, as a settlement should never be allowed to rest on a mere covenant of the settlor to make such surrender.

As to stock in the public funds.]—Where the settlement consists of stock in the public funds, as property of this kind is incapable of passing by a deed of assignment at law, the practice has been to transfer the stock into the names of the trustees of the settlement, and in such case the articles generally stipulate either that such stock shall be so transferred, or that the same may become vested in the trustees of the intended settlement upon the trusts therein declared.

Future acquired property.]—If the settlement is intended to embrace future acquired property, it will be necessary to stipulate expressly that all such real and personal estate as the party shall or may at any time thereafter become possessed of, or legally or equitably entitled to, shall be conveyed, settled, and assured unto the trustees of the settlement upon the trusts therein declared, and empowering trustees to vary securities, grant leases, sell, exchange, &c. Settlements of this kind are generally made where the intended wife has future expectancies which it is not intended should become either the absolute property, or be in any way under the control, of the intended husband: (see a form of the above kind, 1 Con. Prec., Part IV., Section I., No. IV., pp. 657, 660, 2nd edit.)

Where property is to be settled to the separate use of intended wife.]—Where the whole or any portion of the property is designed to be settled to the separate use of the intended wife, it should be stipulated, in case it be real estate, that it shall be conveyed, and, if personalty, assigned to a trustee in trust for her until the marriage, and, after such marriage, in trust during the joint lives of her and her intended husband, to pay the rents and profits, and interest and dividends, according to the nature of the property, to such person or persons as she shall by any writing, but not by way of anticipation, appoint, and in default of appointment, into her own hands for her sole and

separate use, free from the debts, control, or engagements of her intended husband; and, if her intended husband should die in her lifetime, in trust for her heirs, or executors, or administrators, according to the nature of the property; but, if she should die in his lifetime, then upon such trusts as she shall by will appoint; and, in default of appointment, in trust for the children of the marriage, and, if no children, in trust for her heirs or next of kin.

CHAPTER II.

MARRIAGE SETTLEMENTS.

I. Introductory Observations.

It is not a common practice to investigate the title of the property intended to be settled with the same degree of scrutiny as in the case of a sale or mortgage; still, it will be necessary to discover what estate or interest the settlor takes in such property, as also the extent of his interest or his power of disposition over it; and, when the subject-matter of the settlement consists of real estate, it will also be essential to ascertain in whom the legal estate is vested, and, whenever it is practicable, to get in such legal estate, and vest the same in the trustees of the settlement; and in no case to leave it outstanding, either in the settlor or in any other person over whom he has any power or control; otherwise the settlor, by mortgaging the property to some person who has no notice of the settlement, might defeat the settlement to the extent of the mortgage. And if the property is subject to any incumbrances, and the settlor has the

means of discharging them, the better plan will be to have them all discharged, so as to leave the settled property wholly free and unfettered; and, even if this cannot be arranged, the settlement ought always to contain a provision for a sale of part of the property for the purpose of paying them off.

II. Proper modes of Assurance for effecting Marriage Settlements.

The proper instrument for a marriage settlement, when the property intended to be settled consists of freehold estates, is a deed of release, which is now rendered as effectual for the conveyance of property of that description as a lease and release by the same parties: (stat. 4 & 5 Vict. c. 21.) The property both of the intended husband and intended wife may be, and indeed most frequently is, inserted in the same deed. But when the property of both is large, separate deeds are often employed.

When the settlor is tenant in tail.]—When the settlor is tenant in tail, and a disentailing deed becomes necessary to authorize such settlor to make the settlement, the disentailing deed should be a separate instrument from the settlement (unless the latter is penned in a very concise form), in order to avoid the expense of having the whole deed of settlement enrolled, which would be indispensable if it was contained in the disentailing assurance.

Money secured upon mortgage, if included in the settlement, will render two deeds of settlement necessary.]—And so, where money secured by mortgage is to form part of the settlement, the mortgage itself ought to be assigned to the trustees of the settlement. This must be done by a separate instrument from the deed, declaring the trusts of the mortgage money; because, as all deeds of transfer of mortgage form part of the mortgagor's title, he is entitled, on redeeming the mortgage, to have every deed of conveyance or transfer of the mortgaged premises delivered over to him. To avoid the inconvenience which must otherwise inevitably result at some time or other, it will always be proper to transfer the mortgage deed and mortgaged premises to the trustees of the settlement by one deed, and to declare the trusts of the money by a distinct and separate instrument.

As to railway shares.]—Again, when railway shares are to

be settled, two distinct instruments will be required; one for effecting the transfer to the trustees, which must be duly registered in the books of the railway company, and endorsed on the deed of transfer (as to which see *ante*, p. 391), the other being the deed of settlement itself, in which the trusts of such shares are to be declared.

Assignment of personal securities should be accompanied by a power of attorney.]—Where any bonds, notes of hand, or other personal securities for the payment of money or debts of any kind or description are assigned, a power of attorney, authorizing the assignees to sue for and enforce the payment of such securities, and to give effectual releases and discharges for the same, should always be inserted in the deed of assignment, otherwise assignment of such securities passes only a mere chose in action, and the assignee would have no legal remedy for enforcing payment: (see the form 1 Con. Prec., Part IV., Section II., No. V., clause 7, p. 710, 2nd edit.; *ib.* No. VII., clause 9, p. 721, 2nd edit.)

Power to compound debts.]—Where debts are assigned, it will be proper to insert a power authorizing the trustees to compound or compromise any of such debts; to give time for payment or take any security for the same; as also refer to arbitration any dispute that may arise respecting them. This is a very necessary clause for the protection of the trustees, and one which they have a fair and reasonable right to insist upon having inserted in the settlement: (see the form 1 Con. Prec., Part IV., No. VII., clause 10, p. 722, 2nd edit.)

When moneys to be settled are payable at some future period.]—When moneys to be included in the settlement are to be paid at some future period, the settlor usually enters into a covenant to that effect with the trustees, in which the amount and time of payment is specified; as also the amount of interest (if any) to be paid in the interim (see the form 1 Con. Prec., Part IV., No. IX., clause 3, p. 729, 2nd edit.), which covenant is sometimes accompanied by a bond as a further or additional security; sometimes the bond alone is given: (*ib.* No. XII., p. 449.) Sometimes it is covenanted that such moneys, or some portion of them, shall be bequeathed by the settlor's will: (*ib.* No. IX., clause 4, p. 730.) Covenants of the latter kind are sometimes entered into, not only by the intended husband, but also by a parent or other relative, either of himself or of his intended wife. When the

latter occurs, it is common to add a proviso that if such parent, or other relative, shall die intestate, and the distributive share of the party for whose benefit the payment is to be made shall receive out of such intestate's effects as much, or more, than the amount covenanted to be paid, such distributive share shall be taken to be a satisfaction of the covenant: (see the form 1 Con. Prec., Part IV., Section II., No. IX., clause 4, p. 730, 2nd edit.)

Where moneys advanced to husband are to be secured by a policy of assurance upon his life.]—Sometimes, as we have already noticed, part of the intended wife's fortune is paid to the intended husband, who has effected a policy of assurance upon his life, either to that or some other amount, which is to be assigned upon the trusts of the settlement. This policy should be assigned to the trustees of the settlement, and the intended husband should covenant to keep up the policy at his own costs, with power to the trustees to do so in case of his default, and to defray the costs out of the trust moneys.

Proper course of proceeding when the intended wife is desirous of making a provision for her children by a former marriage.]—When the intended wife is desirous of making a provision for her children by a former marriage, it should be done either by the settlement made upon her subsequent marriage, or by some instrument in which her intended husband is a concurring party, so as to be binding on him, and prevent any questions from arising at any future time as to the disposition so made being in derogation of his marital rights. This, it seems, is rather to be adopted as a prudent course, and to prevent questions from arising as to the validity of such settlement, than from any actual necessity; for although, as a general rule, an intended wife cannot, after a treaty of marriage has actually been commenced, make any disposition of her own property, whether real or personal, without the consent of her intended husband, which will be binding upon him (*Howard* v. *Hooker*, 1 Eq. Ca. Abr. 59; *Countess of Strathmore* v. *Bowes*, 1 Ves. jun. 194); still, such rule admits of an exception when made for a meritorious object, as to provide for her children by a former husband (*Blyth's case*, Freem. 29; *Hunt* v. *Mathews*, 1 Vern. 408; *King* v. *Cotton*, 1 P. Wms.; 2 P. Wms. 358, 674); but it seems never to have been decided, and appears to be a very doubtful point whether such an exception would be allowed in favour of illegitimate children.

III. Practical Directions for preparing the Settlement.

1. Parties.
2. Recitals.
3. Of the testatum clause.
4. Habendum clause.
5. Declaration of uses and trusts.
6. Powers and provisoes.

Settlement should be made in strict accordance with articles.]—Wherever marriage articles have been entered into, the deed of settlement should be made in strict accordance with them, and a settlement executed after marriage, which departs in any way from the obvious intention of the latter instrument will be set aside in equity, and another settlement directed, by which such intention is to be properly carried out: (*Higginson* v. *Keley*, 1 Ball & B. 253.) Yet, if a settlement be made prior to the marriage, and it is not expressed to be made in pursuance of articles previously entered into, any discrepancy between the articles and the settlement, will afford no ground for equity to set the latter aside, as the court will then presume that the parties had abandoned the terms of the articles, as they had clearly a right to do, and entered into a fresh arrangement as to the settlement of the property: (*Glanville* v. *Payne*, 2 Atk. 39; *Warwick* v. *Warwick*, 3 *ib*. 291.) But if the settlement is expressed to be made in pursuance of the articles, then, whether it be executed prior or subsequent to the marriage, if it is inconsistent with the articles, it will be rectified in equity, even against a purchaser for valuable consideration who buys with notice of the articles.

1. *Parties to the Settlement.*

Order in which parties should be placed.]—The parties should be placed in the same order in the deed of settlement as we have pointed out in the previous section; in addition to which it may be proper to add here, that all persons having any estate or interest in the settled property, or intended to be bound by the deed of settlement, should be made parties to it, otherwise they will not be so bound; nor will the making them parties be alone sufficient to bind them. To effect this, it is also necessary that they should either execute the deed, or perform some act under it by which they recognise its authority, as in the case of trustees, who, if they act in the slightest degree in the execution of the trusts of the settlement, will be as much bound

by it, although they never executed it, as if they had actually set their hands and seals to the instrument. Still, notwithstanding it is a very common practice for the conveying parties only to execute the deed, it will always be the most correct and proper course to make the trustees and every other party execute it also.

As to the description of the parties.]—In describing the parties in a marriage settlement, a learned writer observes, it is always proper to describe them fully, and to give a particular account of their abode and profession or trade; because as settlements are not often acted upon for many years, such description may assist the discovery of trustees and others taking an interest under the deed. The relationship of the parties is also frequently mentioned immediately after their description. And it was usual at one time to mention the character in which they acted; but this is at present never done, unless the property is very small and no recitals are inserted: (7 Byth. Prec. Parker & Stewart's edit. 353.)

2. *Recitals.*

Lengthy recitals are seldom used in marriage settlements, and sometimes recitals are omitted altogether. Still, where no other recitals are introduced, it is usual to recite that a marriage is intended, and that the settlement is to be in consideration of the same; and where real estate is to be settled, although it is not generally the practice to go far back into the early history of the title, it may often be proper to recite enough of it to show the owner's estate and interest therein, and the extent of the power of disposition he possesses over it; as also the state of the property itself, and the estates of all persons who are interested therein. Yet, whenever brevity is desirable, even these recitals may be dispensed with, and, in the recital of the intended marriage, it may be simply mentioned, that the premises thereinafter described are intended to be settled to the uses thereinafter declared, without setting out in any way how, or in what way the settlor became possessed of the ownership of the property: (see the form 1 Con. Prec., Part IV., Section II., No. I., clause 2, p. 667.) But where the settlement is made in exercise of a power of appointment; as where a tenant for life is empowered to limit a jointure to a wife, or the parents of the intended husband or wife, who are the settlors, derive their power through

some prior deed of settlement, or will, in either of these cases, the deed or will creating such power ought to be recited, and this rather fully, in order that the settlement may show that all the terms of the power have been strictly complied with. So, also, where an annuity forms a subject of the settlement, the instrument creating it ought always to be recited.

Copyholds.]—And where copyholds form the subject matter of the settlement, it is usual to recite shortly the estate or interest which the settlor takes in the premises; as that he is entitled to the same for an estate of inheritance to him and his heirs according to the custom of the manor: (see the form 1 Con. Prec., Part IV., Section II., No. III., clause 2, p. 694, 2nd edit.)

Stock in the funds.]—In the case of stock in any of the public funds, if the settlor takes an absolute interest, it is neither necessary nor usual to show how he became so entitled, but the recital ought to state that the stock is the property of the settlor, and the agreement to settle the same upon the trusts of the settlement; and if the stock has been, as it ought always to be, transferred into the names of the trustees of the settlement prior to its execution, that fact ought also to be recited: (see the form 1 Con. Prec., Part IV., Section II., No. IV., clauses 2 and 3, p. 702, 2nd edit.; *ib.*, No. V., clauses 2 and 4, p. 709.)

Money secured upon mortgage.]—We have just before noticed, that when money secured upon mortgage is to be included in the settlement, two distinct instruments will be necessary for that purpose; one to transfer the mortgaged premises and mortgage money, and the other to declare the trusts upon which such mortgage money is to be held. Whenever this occurs, it will be proper in the deed of settlement declaring the trusts, to recite the original mortgage, and also the transfer of the same to the trustees of the settlement, and of the declaration in the deed of transfer, that the trustees shall stand possessed of the mortgage moneys upon the trusts of such settlement: (see the form 1 Con. Prec., Part IV., Section II., No. IV., clauses A. B. and C. *in notis*, pp. 702, 703, 2nd edit.)

Securities for money.]—Where bonds, notes of hand, or any other personal securities are given to secure the payment of any moneys under the settlement, the nature of the

security should be set out in the recitals, as also the time and manner in which the payment is to be made.

Policy of assurance.]—If a life policy of assurance forms part of the settlement, it should be set out accurately in the recitals, so that no possible doubt can at any future time be raised as to its identity. It sometimes happens, that some part of the wife's fortune is paid into the husband's hands upon the marriage, upon his assigning to the trustees of the settlement a policy of assurance upon his life to the same or some other amount. In a case like this, the proper way of penning the recitals is to recite that, upon the treaty for the marriage, it was agreed that a certain sum of money should be paid him by his intended wife, upon his effecting a policy of assurance in the sum stipulated for, which policy he is to assign to the trustees of the settlement upon the trusts thereinafter declared, and to enter into a covenant to keep up the policy, and also that such assurance has been effected accordingly.

Where husband's interest is intended to determine in case of his bankruptcy or insolvency.]—We have previously noticed that a wife's property may be settled so as to defeat the operation of the bankrupt laws, as may also that of the husband, provided he has obtained property from his intended wife of the same amount, and the settlement is made in consideration thereof. Whenever, therefore, it is designed to carry out the latter object, it will be proper first to recite the history of the title of the property intended to be settled, and then of the agreement for the marriage, and that upon the treaty for the marriage the intended wife's fortune, setting out the amount, should be paid over to the intended husband, who, in consideration thereof, should settle the premises thereinafter described upon the trusts thereinafter mentioned, and that the intended wife's fortune had been paid over unto the intended husband accordingly.

As to future property of the wife.]—Where any future property, which the wife may acquire is intended to be settled to the uses, or upon the trusts, of the settlement, it will be proper to insert the recital to that effect, in which should also be set out what kind of property it is intended to comprehend.

3. *Of the Testatum Clause; of the Consideration.*

The marriage is a sufficient consideration for the settlement, where it is executed before marriage, or when made

in pursuance of articles executed before the marriage; still, it is usual, particularly where real estate is comprised in the settlement, to insert a nominal pecuniary consideration, as five shillings, for instance; and where the intended wife's fortune forms part of the consideration of the settlement, or there is a mutual settlement, it is proper to state the nature and amount of the consideration: (see the form 1 Con. Prec., Part II., Section II., No. V., clause 6, p. 709, 2nd edit.) But where nothing but personal estate is settled, it is a very common practice to state the marriage consideration only; sometimes, however, adding the object of the settlement to be for making some provision for the intended husband and wife, and the issue of the marriage: (see the form 1 Con. Prec., Part IV., Section II., No. 9, clause 3, p. 729, 2nd edit.)

Operative words and parcels.]—The property, of whatever nature it may be, ought to be conveyed and assigned in the same manner, and with the same operative words, by the same description, and with the same general words as in a purchase, or a mortgage deed.

4. *Habendum Clause.*

How settled property ought to be limited.]—By the habendum clause, the settled property ought always to be limited to the trustees in joint tenancy, so that upon the death of either of them, the whole estate may go over to the survivors, instead of any portion of it becoming vested in the representatives of the deceased trustee.

How freehold estates should be limited.]—If the settled lands are of freehold tenure, the proper way will be to limit them to the trustees and their heirs, to the uses, upon the trusts, and for the ends, intents and purposes, and with, under, and subject to the powers, provisions, declarations, and agreements thereinafter declared; after which the uses to arise out of the seisin of the trustees must be declared in their proper order in the settlement deed.

Care must be taken not to execute the use in the trustees where legal estates are designed to arise out of the seisin.]—Where legal estates are to be created, care must be taken not to limit the estate to trustees to uses in such terms as would execute the use in them, as it certainly would do, if limited "unto and to the use of the trustees," the consequence

of which would be, that all the estates to arise out of their seisin will be mere equitable estates; but where it actually is intended to create equitable estates only, then it will be proper to limit the use to the trustees. Leaseholds for lives may be settled in the same way as freeholds.

As to leaseholds.]—But in the case of leaseholds for years, whether for an absolute term, or determinable on lives, no mode of limitation can be penned by means of which the objects of the settlement can be made to take legal estates through the medium of a limitation to the trustees; because the Statute of Uses has no operation upon an assignment of leasehold property, and the legal estate will become completely vested in the parties to whom it is first limited.

Copyholds.]—In the case of copyholds also, which are not within the operation of the Statute of Uses, the legal estate cannot be transmitted through the seisin of trustees to uses; but the equitable interest may be limited in strict settlement, and all the other purposes of a settlement effected.

5. *Declaration of Uses and Trusts.*

Limitation to settlor until solemnization of marriage.]—The first use or trust declared in the settlement is for the settlor, until the solemnization of the marriage, to prevent the inconvenience which might otherwise result, in case of the death of the settlor after the execution of the settlement, but before that ceremony takes place; which, although not a probable, is nevertheless a possible event, and one that before now has actually happened: (*Trevelyan* v. *Trevelyan*, 3 Bing. 617.)

Limitation of rentcharge by way of jointure or otherwise.]—If a rentcharge is to be created, either by way of jointure for the intended wife, or by way of provision for the intended husband, or for any other purpose of the settlement, the uses of such rentcharge ought to be the first in order, to which should be annexed the usual powers of distress and entry: (see the form 1 Con. Prec., Part IV., Section II., No. I., clauses 6 to 9 inclusive, 2nd edit.)

As to the terms of years to secure rentcharge.]—Any term of years that is to be created, either for the purpose of securing such jointure or rentcharge, or pin money for the intended wife, or any other purposes of the settlement,

should be next inserted, and previously to any limitations of estate for life or in tail: (see the form Con. Prec., Part IV., Section II., No. I., clause 11, 2nd edit.)

Limitations in strict settlement uses, how limited in ordinary forms of strict settlement.]—In the ordinary form of strict settlement, the lands are limited to the settlor for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the intended marriage in tail, with remainder to the use of daughters as tenants in common in tail, with cross remainders between them, with the ultimate remainder to the right heirs of the settlor.

Where sons of a future marriage are to be preferred before daughters of present contemplated marriage.]—Whenever it is intended, as is almost invariably the case, that the entailed property is to be transmissible to all the sons of the settlor, as well by a future, as his then intended wife, in preference to daughters of the intended marriage, it will be necessary to interpose a limitation *to the use* of the first and other sons of the intended husband by any future marriage, before the limitation *to the use* of the daughters of the intended marriage; after which may be superadded a limitation *to the use* of the daughters of the intended husband, by any future marriage: (see the form 1 Con. Prec., Part IV., Section II., No. I., clauses 19 to 22 inclusive, pp. 671, 672, 2nd edit.)

Practice to continue trustees to preserve contingent remainders, although no longer actually necessary.]—It is no longer actually necessary to insert a limitation to trustees to preserve contingent remainders, in order to preserve such remainders from destruction by the determination of the preceding life estate before such remainders become vested, it being expressly enacted by the statute 8 & 9 Vict. c. 106, that contingent remainders existing after the year 1844, are not to fail by the destruction of the prior particular estate: (sect. 8.) Still, so little reliance seems to have been placed by the profession on the operation of this statute, which appears to be rather obscurely worded, that the clause still retains its usual place in settlements of real property, whether it be limited by deed, or by will.

Practical suggestions for preparing limitations to trustees to preserve contingent remainders.]—In penning the limitation to trustees to preserve contingent remainders, care

must be taken to give them an estate *for the life* of the preceding tenant for life; for if these words are omitted, the trustees will take the legal fee, and all the subsequent estates will be merely equitable: (*Elmore* v. *Tindall*, 2 Yo. & Jerv. 605.)

Term of years sometimes limited to intended husband, instead of a life estate.]—Sometimes, where it has been considered desirable to keep the settled property for a long time in the family, instead of giving a life estate to the intended husband, a term of years, as ninety-nine years, for instance, has been limited to him, if he shall so long live. The object of doing this, was to prevent the estate tail from being barred without the concurrence of the trustees, in whom the estate of freehold is vested during that period; and which consent it seems the trustees would not be authorized to give without the direction of the Court of Chancery: (*Tipper's case*, 1 P. Wms. 359; *Else* v. *Osborne*, *ib.* 387; *Bassett* v. *Clapham ib.* 358.)

Life estate to intended husband usually limited to be without impeachment of waste.]—In whatever way the estate is limited to the intended husband, whether for life or a term of years, if he shall so long live, it is usual to make his estate unimpeachable for waste, which will authorize him to work mines and quarries that are already open, but not to open new ones (2 Hughes Pract. Sales, 477, 2nd edit.); and also to cut down timber generally, treating it in a husbandlike manner, with due regard to the beauty of the place (*Burgess* v. *Lamb*, 16 Ves. 183), although it will not authorize him to cut down trees which have not arrived at a state of maturity, or which have been planted for the ornament or shelter of the mansion house, or to pull down houses (*Vane* v. *Lord Barnard*, 2 Vern. 738), or even to allow them to become ruinous for want of proper repairs: (*Abrahall* v. *Bubb*, 2 Freem. 581.) So that if he is to have more extended powers than those we have above mentioned, they must be expressly conferred upon him.

Life estate sometimes limited to wife for her jointure.]—Although it is the more frequent practice to limit a rent-charge as a jointure for the wife, it is by no means uncommon to give her a life estate, either in the whole, or some portion of the settled property, which, in case the property is of freehold tenure, is generally limited to her unimpeachable for waste.

As to copyholds.]—In strict settlements of copyholds, they are either surrendered to the trustees of the settlement prior to the execution, or the settlor in the deed of settlement enters into a covenant to that effect; in either case, the trusts are declared by the settlement, which are, that the trustees shall, out of the rents and profits, defray the expenses incidental to the surrender, and of their admission to the copyhold premises, and subject thereto, in trust for the settlor for life, with remainder *upon trust* for the first and other sons of the marriage in tail, with remainder in trust for the daughters successively, or, as more frequently occurs, as tenants in common in tail; with the ultimate trust for the settlor, his heirs and assigns: (see the form 1 Con. Prec., Part IV., Section II., No. III., clauses 5 to 10 inclusive, pp. 694, 696, 2nd edit.)

As to leaseholds.]—When leasehold estates for years are included in the settlement, as they are incapable of being entailed, the nearest way of effecting a strict settlement of such property is a declaration that the trustees shall hold them upon such trusts as will nearest correspond with the uses declared of the freeholds.

Declaration of trusts of terms.]—After the declaration of the several uses and trusts in favour of the parties taking beneficially under the settlement, the trusts of the terms of years limited by the settlement, whether for securing a jointure; raising pin money; portions for younger children, or for their maintenance or advancement, or any other purpose, should be next declared: (see the form 1 Con. Prec., Part IV., Section II., No. I., clauses 24 to 36 inclusive, pp. 672-679, 2nd edit.)

Usual limitations of real estate when not entailed.]—Where real estate is not entailed, it is generally limited, after the intended marriage, to the use of the intended husband for life, and a provision is generally made for the intended wife, either by a rentcharge by way of jointure, or a life estate either in the whole, or in some portion of the property, in case of her surviving her intended husband, with a power of appointment to the intended husband and wife, or the survivor amongst the children of the intended marriage, and in default of such appointment, the property is generally limited amongst the children in equal shares, as tenants in common in fee, with cross remainders between them, with powers of maintenance and advancement; and in case there shall be

no children of the intended marriage, an absolute power of appointment is generally limited to the settlor, to whom, in default of appointment, the ultimate use is also limited.

Propriety of inserting hotchpot clause where power is to be exercised in favour of children.]—Where a power of appointment is limited to be exercised in favour of the children of the intended marriage, it is generally usual to insert a hotchpot clause, wherein it is provided that no child, taking any portion of the settled premises under the power of appointment thereinbefore limited, shall be entitled to share in the unappointed part of the said premises, without bringing his or her appointed share into hotchpot, and accounting for the same accordingly.

Where real estate is settled upon trusts for sale.]—It is not an unusual practice to settle real estate upon trusts for sale, and this is particularly the case where the lands are not of great value, and are settled with personal estate, and both kinds of property are designed to be upon the same trusts, and for the benefit of the same persons. In a case of this kind, the lands are limited to the trustees, in trust, with the consent of the intended husband and wife, or of the survivor, to sell the same, give receipts for the purchase moneys, and to stand possessed of the trust moneys upon the trusts of the settlement.

Where real estate, the property of the intended wife, is to be settled to her separate use.]—Where real estate, the property of the intended wife, is to be settled, and it is designed to give her an absolute power of disposition over it, the mode usually adopted has been, to convey the property to trustees, in trust for the wife until the marriage; and after the marriage, *in trust*, during the joint lives of the husband and wife, to pay the rents and profits to such persons as she shall by any instrument in writing, but not by way of anticipation, appoint, and in default of appointment, into her own hands for her separate use, her receipt, or that of her appointees, to be a sufficient discharge for the same; but if she should die in his lifetime, then upon such trusts as she shall by will appoint, and in default of appointment, in trust for the children of the marriage, and if no children, in trust for her right heirs.

Origin of vesting the legal estate in the trustees.]—The practice of vesting the whole legal fee in the trustees arose

from the erroneous notion which at one time prevailed amongst the profession, that a power of appointment over the legal estate could not be reserved to a married woman who takes a legal estate in fee in the same premises; but it is now clearly established that a power of the above kind is perfectly valid, and will authorize a married woman to dispose of her real estate even at law (*Rex* v. *Lord of the Manor of Oundle*, 1 Ad. & Ell. 283); whilst her right to make an appointment of a mere equitable or trust estate has been long since recognized (*Glynn* v. *Bagster*, 1 You. & Jerv. 329), a power that extends as well to copyhold as to freehold estates (*Rex* v. *Lord of the Manor of Oundle*, *supra*), and may be limited to an unmarried woman who afterwards marries (*Gibbons* v. *Moulton*, Finch, 346), or to a woman who is actually under coverture, or upon her marriage, and she survives her husband and afterwards marries again (*Burne* v. *Mann*, 1 Ves. 157); in all of which cases she may execute the power without her husband's concurrence: (see the form of power of appointment of the legal fee reserved to a married woman, 1 Con. Prec., Part IV., Section III., No. II., clause 7, p. 765, 2nd edit.)

Where property is to be settled upon unalienable trusts for wife's benefit.]—But whenever it is designed that the annual profits of the property are to be settled in such a manner that she may always continue to receive them during her lifetime, and that neither she nor her husband may have the power to alienate the same, then the proper course will be to vest the legal estate in the trustees, at any rate to the extent of her life interest in the property, upon trust to pay the rents into her hands for her separate use, but without power of anticipation, as hereinbefore mentioned. Without the latter restriction, a limitation, whether to her use or in trust for her separate use, will give her an absolute power of disposition, and enable her, by a sweeping appointment, to pass away her whole interest: (*Parkes* v. *White*, 11 Ves. 221; *Glynn* v. *Bagster*, *supra*.) At one time, indeed, it appears to have been doubted whether a restriction against anticipation was valid even during the coverture, upon the principle that wherever property is given it must be taken with all its incidents; but, after a considerable conflict of opinion, it seems to have been at length determined that the restriction is binding *during coverture*, although created whilst the woman was unmarried, or without any reference to any particular marriage (*Scarborough* v. *Borman*, 4 Myl. & Cra. 477); still, the restriction will only be binding during

the coverture; for whilst sole, whether before her marriage or during her widowhood, she will retain or regain her power of alienation, although liable to be afterwards deprived of it by her subsequent coverture: (*Newton* v. *Reid*, 4 Sim. 141; *Browne* v. *Pocock*, 5 *ib.* 563.)

As to wife's future-acquired property.]—If any future property of the intended wife is to be settled, it should be declared that all such property shall be conveyed, assigned, or otherwise assured to the trustees of the settlement, who are to stand possessed of the same upon the trusts therein declared, which should be then declared and set forth accordingly.

Where husband is to give a policy of assurance to secure advances made to him by trustees out of the trust moneys.]—We have already noticed that part of the wife's fortune is sometimes advanced to the intended husband on his assigning a policy of assurance upon his life, in the same, or some other amount, by way of equivalent, to the trustees of the settlement. Besides this, it is also sometimes arranged that the trustees are to be empowered to make advances to the intended husband not exceeding some certain specified amount, either in separate sums, or in one entire sum, the repayment of which he is to secure by means of a policy of assurance upon his life. To carry out this object, the best way seems to be to insert a proviso authorizing the trustees to make the above-mentioned advances, upon the intended husband effecting a policy of assurance upon his life to the amount of such advances, and assigning the policy to them as a security for the repayment thereof, he at the same time covenanting to pay the annual premiums, with power for the trustees to do so in case of his default, and to defray the expenses thereof out of the trust moneys; concluding with a declaration that all moneys received by the trustees on account of the policy are to be held by them upon the same trusts as the trust moneys out of which such advances were made: (see the form 1 Con. Prec., Part IV., Section II., No. VI., clause 4, p. 716.)

Usual trusts declared in settlements of personal property.]—The trusts usually declared in a marriage settlement of personal property are, of life interests to the intended husband and wife, with a power of appointment over the trust fund in favour of their children, who, in default thereof, are to

take equally as tenants in common; and, in case there are no children of the marriage, the settlor has generally an absolute power of appointment over the trust fund, which, in default of exercising, is to be transmissible either to his, or the intended wife's, personal representatives. It is also usual to insert provisions for the maintenance and advancement of the children during their respective minorities: (see the form 1 Con. Prec., Part IV., Section II., No. IV., clauses 7 to 12 inclusive, pp. 704, 705, 2nd edit.)

Where the settled property moves from the husband.]—If the settled property moves from the intended husband, and both he and his intended wife are to take life interests therein, the most usual practice is to declare that the interest, dividends, or other annual proceeds shall be received by him during his lifetime, and that after his decease the same shall be paid to the intended wife during her lifetime in case she happens to survive him: (see the form 1 Con. Prec., Part IV., Section II., No. IV., clauses 7 and 8, p. 704, 2nd edit.)

Where the settled property belongs to the wife.]—Where the settled property comes all from the intended wife, the trusts of the first life interest are sometimes declared for her benefit, yet to render such a trust effectual, it will be necessary to declare it to be for her sole and separate use (see the form 1 Con. Prec., Part IV., No. XIII., clause 8, p. 754); and, if it is to be unalienable, it must be declared that she shall have no power to dispose of the same by way of anticipation.(1)

As to powers of appointment.]—The power of appointment in favour of the children is usually a joint power during the lifetime of the intended husband and wife; but if, as is almost always the case, the power is to be exercised by the survivor, it must be so stated, otherwise an appointment made by the survivor would not be warranted by the terms of the power. And if such survivor is intended to exercise the power by will as well as by deed, it should be so stated: (see the form 1 Con. Prec., Part IV., Section II., No. IV., clause 9, p. 704, 2nd edit.)

Declaration of trusts for children of marriage.]—The trusts in favour of the children of the intended mar-

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(1) See observations upon this subject, *ante*, p. 593.

riage should be declared to be for such of them, who, being sons, shall attain twenty-one, or who, being daughters, shall attain that age or marry. The advantage of penning the clause in this form is, that it will embrace such objects only as attain that age, or answer the required description; and therefore no provisions for survivorship or accruer will be required in case of the death of any child who shall die previously to attaining the required age or description, but which would have been necessary to vest the shares of any deceased child in the survivors, if the children had taken vested interests at any earlier period, although the time of payment or assignment of the shares, was postponed to some future time.

Ultimate limitations in favour of next of kin.]—In penning the ulterior limitations, it must be remembered that the term "*next of kin*" means "kindred of blood," so that a husband will not be included under those terms (*Watt* v. *Watt*, 3 Ves. 244; *Bailey* v. *Wright*, 18 Ves. 49); and the construction will be the same where a power is given to a wife to appoint in favour of her next of kin: (14 Ves. 382.) But where the limitation is to the executors or administrators of the wife, if the husband be appointed her executor or administrator, then he will be entitled to take the property under either of those descriptions. If, therefore, he is intended to take or receive the benefit of the ultimate trusts, such trusts should be declared to be for the wife's executors or administrators; if he is to be excluded, then for her next of kin.

6. *Power and Provisoes.*

After the declaration of the several uses and trusts, the powers limited by the settlement are next inserted. These, in the case of real estate, consist of powers to make partition, of sale, or exchange; to appoint portions for younger children, and to grant leases; subjects which have already been discussed in the preceding chapter, and to which we beg to refer our readers. With respect to the powers of leasing, however, a few further observations may be proper in this place.

Where the power is to grant leases in possession only.]—Where it is designed, as is most commonly the case, that the power of granting leases is only to extend to the powers of granting leases at rack rent and in possession, it should be so expressed in the limitation of the power, to which should

also be added that no fine, premium, or foregift is to be given or taken for making the same. To this it will also be proper to superadd, that every lease so granted shall contain a proviso for re-entry for nonpayment of the reserved rents, for the space of some specified number of days next after the same shall become due, as twenty-one days, for instance; and that the lessees shall enter into a covenant for the payment of the same, and also execute the lease, or a counterpart thereof, and so that the lessee shall not be made dispunishable for waste: (see the form 1 Con. Prec., Part IV., No. I., clause 44, p. 683, 2nd edit.)

As to power to grant renewals of leases.]—Where, however, it has been customary to grant or renew leases for lives, or years determinable on lives, of any parts of the settled property on the payment of fines or other pecuniary considerations, it is a very common practice to insert a power in the settlement authorizing tenants for life or in tail to grant or renew such leases, upon the same terms on which the same have been usually granted.

Power to grant building leases.]—And where any of the settled property is adapted for building purposes, power to grant building leases may often become necessary.

As to power to grant mining setts or leases.]—If any part of the settled property is situated in a mining district, it will generally be proper to insert a power authorizing the settlor to open and work mines on his own account, or to grant mining setts or leases empowering others to do so, provided such grants be made in accordance with similar grants of a like nature in the surrounding neighbourhood or district; for, except under a power of this kind, a tenant for life, unimpeachable for waste, as we have already noticed, although allowed to work mines and quarries already open for his own benefit, will not be allowed to open new mines, or to make any grants to authorize others to open and work the same.

Power for trustees to give receipts.]—Where trustees are authorized to give receipts for moneys coming into their hands in the execution of the trusts of the settlement, the best plan, instead of mentioning the names of the trustees, is to declare that the receipt or receipts of the trustees or trustee for the time being of the settlement shall be a discharge for all money expressed to have been received by

them in the execution of the trusts of the settlement (see the form 1 Con. Prec., Part IV., Section III., No. III., clause 18, pp. 775, 776, 2nd edit.); or if the names of the trustees are to be mentioned, then, not only to extend the power to the survivors or survivor of them, and the personal representatives of the survivor, but to add also, "or other the trustees or trustee for the time being of these presents;" for where the trustees are mentioned by name, then every trustee who has accepted the trusts must concur in such receipt, although he may have released his estate to the other trustees (*Crewe* v. *Dicken*, 4 Ves. 97); because, notwithstanding the release of his estate to his co-trustees, he cannot delegate the personal trust or confidence reposed in him; but, by adopting either of the courses above recommended, it will be unnecessary for a trustee who has released the trust, and his estate in the trust property, to join in any receipt; nor is there the slightest ground for contending that a personal trust or confidence was given to the trustees named in the instrument creating the power; consequently, the receipt of the trustees acting in the trusts for the time being would satisfy both the words and the spirit of the clause.

Appointment of new trustees.]—In penning the clause authorizing the appointment of new trustees, it will be proper to provide that, immediately upon the appointment of any new trustee, all the trust estates shall be forthwith conveyed and assured so as to become vested in him, either jointly with the surviving or continuing trustee or trustees, or solely, as the case may be, and then to add that every such new trustee, either before or after such conveyance, shall have the same power as if he had been originally appointed a trustee by the deed of settlement itself. The latter portion of this clause is very important; for it has been determined that a mere appointment does not constitute the appointee a complete trustee, and that he cannot act as such until the trust estate has been legally vested in him by an actual conveyance or assignment of the property: (*Warburton* v. *Sandys*, 14 Sim. 622; and see *Bennett* v. *Burgis*, 5 Hare, 295.)

As to the clause of indemnity to trustees.]—The concluding clause of a deed of settlement is a proviso which professes to exonerate the trustees from the acts or defaults of their co-trustees; for involuntary losses; for liabilities under receipts in which they shall have only concurred for conformity; and

also from being accountable for any banker, broker, or other person in whose hands any of the trust moneys may be deposited for safe custody or otherwise, or the sufficiency of any securities in or upon which any of the trust moneys may be invested, or any other loss that may happen to the trust estate, unless through the wilful default of such trustees respectively. But this clause, although worded in terms expressive of ample indemnity, is in reality a mere formal clause, to which a court of equity pays very slight regard, and which, in reality, does not relieve the trustees from any of their equitable responsibilities, nor afford them any further protection than they would have been entitled to, if the clause had been left out of the settlement altogether. In fact, the responsibilities of trustees are so great, and possess so very few advantages, that it seems surprising that persons actually cognizant of them should be found to accept so thankless, troublesome, unprofitable, and dangerous an office; there being so many ways by which a trustee, without any default whatever on his own part, may, by the misconduct of a co-trustee, incur liabilities which may involve him in very heavy expenses, if not in utter ruin. Thus, if a trustee, on a representation by his co-trustee that money is wanted to carry on the affairs of the trust, joins in a power of attorney for the sale of stock, or in the reconveyance of a mortgage, and permits the proceeds to go into the hands of the latter, a clause of indemnity, like the one we have just alluded to, would in nowise exonerate the concurring trustee from seeing to the application of the trust moneys: (*Brice* v. *Stokes*, 11 Ves. 510; *Bone* v. *Cook*, 3 Sim. 271.) Neither is there any instance in which a clause of indemnity can be safely relied upon to exonerate a trustee who joins in a receipt from the responsibility he thereby incurs, although not one farthing of the money actually passes through his hands; nor in any case in which he would otherwise be accountable will a clause of this kind relieve him from responsibility. Still, it appears that if a trustee, by the direction or with the consent of the *cestuis que trust*, permits the co-trustee to get the trust moneys into his hands, and the latter afterwards misapplies the same, the concurring trustee would not be accountable for these moneys, so far, at any rate, as the *cestuis que trust* who directed or consented to the receipt of such moneys by the co-trustee are concerned. Nor is a trustee liable, who, with the consent of all the parties interested, lets the money remain in the hands of a person who becomes insolvent: (*Rees* v. *Williams*, De Gex & S. 314.) So, in the case of an attorney who had part of

the trust funds in his hands becoming insolvent, a trustee will not be chargeable if the business was transacted in the ordinary manner, without any circumstance to show suspicion. And in certain other cases, also, where a loss is occasioned by the failure of bankers with whom the money is deposited, the rule of equity seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, a trustee or executor making such deposit will not be held responsible for the loss: (see 15 L. T. Rep. 530.)

CHAPTER III.

POST-NUPTIAL AND VOLUNTARY SETTLEMENTS.

POST-NUPTIAL settlements are usually made in pursuance of articles entered into prior to the marriage, but sometimes they are made for the purpose of settling property which has not been comprised or referred to in any previous settlement. In the first instance, the settlement will be as binding and effectual, as if entered into before the marriage; because, being executed in accordance with an agreement entered into previously to the marriage, the marriage is a sufficient consideration to support the whole assurance; whereas, in the latter instance, the marriage consideration is wanting, without which the settlement is a mere voluntary deed, binding certainly upon the settlor himself, but void in all cases as against all creditors to whom he was indebted at the time he executed the settlement, and also against all purchasers *bonâ fide*, and for valuable consideration without any reference as to whether such purchaser had or had not, at the time he effected his purchase, any notice of the settlement. And when the settlement consists of household furniture or other moveable property of which the settlor is allowed to remain in the visible ownership, it will be void as against creditors, without any reference as to whether the settlor was actually in debt or not at the time he executed such settlement.

As to post-nuptial settlements made under a decree or order of the Court of Chancery.]—There is, however, one kind of post-nuptial settlement not made in pursuance of any articles or agreement prior to the marriage, which will be as binding and conclusive as if all those preliminary proceedings had been regularly gone through. This occurs in post-nuptial settlements made under a decree or order of the Court of

Chancery, in those cases where a man has married a minor without the consent of her parents or guardians, under which circumstances the court, on the information of the Attorney General, at the relation of the parent or guardians, may declare a forfeiture of any interest which the offending party has obtained by the marriage, and may secure such interest for the innocent party, and the issue of the marriage; or, if both are guilty, may secure it for the issue, with a discretionary provision for the offending party, having due regard for the benefit of the issue of that or of any future marriage, which is carried into effect by a settlement made under the directions of the court: (4 Geo. 4, c. 76, ss. 23, 24, 25; *Attorney General* v. *Severne*, 1 Coll. 313.)

Voluntary conveyances when intended to effectuate the objects of a will.]—But besides post-nuptial voluntary settlements in favour of the settlor's wife and family, settlements by way of deeds of gift have often been made in favour of other persons, and to effect, as nearly as may be, the purposes of a will. Instruments of this kind were generally resorted to with a view of evading the probate and legacy duties; but this purpose, so far as the legacy duty is concerned, is now defeated by the Succession Duties Act (16 & 17 Vict. c. 51), by which all property, real and personal, which devolves upon any party after the death of the settlor, is rendered liable to the like duties that were formerly chargeable upon legacies. One important object may, however, be even yet attained by adopting an instrument of the above kind, which is the saving of the probate duties and proctor's bills, and the trouble always incidental to the probate of a will; and by reserving a power of revocation, most of the advantages of a will may be thus achieved.

Power of revocation not alone sufficient to render the instrument testamentary.]—It was, indeed, at one time considered, that the reservation of a power of revocation would have rendered the whole instrument testamentary in its operation, whereby all the legal consequences of a will would have attached upon it, so that it would have required probate in like manner as any other ordinary will. This subject was fully discussed in *Attorney General* v. *Jones*: (Pri. 360.) In that case, A. by indenture dated the 25th day of March, 1813, assigned for a nominal pecuniary consideration certain leasehold property to C. and D.; and also certain stock in the funds, *with the dividends which should be due thereon at the time of his decease, the arrears of any pension that might*

be due to him at the time of his death,(1) and his household furniture, &c., and all other his personal estate then belonging to him, or which should belong to him at his decease, upon trust for himself for life, and after his decease for B. (an illegitimate daughter.) The instrument reserved to A. a power of revocation by deed or will. By will, dated April 16, 1813, A. confirmed the deed, except as to certain particulars, in which he specified and appointed the same persons as were trustees in the deed executors. A. did not part with the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed, which he retained in his own custody. The question was whether the property assigned by this will was liable to legacy duty, and three of the Barons of the Exchequer decided in the affirmative, contrary to the opinion of Baron Wood, who, with all due deference to the other learned barons, was the only one of them who seemed to take a correct view of the case. The judgment is far too long for insertion here, but the circumstances which guided it appear to be as follow: 1. The circumstance of the consideration being a nominal one. 2. That the trust for the grantor was not to receive the dividends merely, but implied a power in him to dispose of the property as he should think proper. 3. That he kept the deed in his own possession; never transferred the stock, nor invested the trustees with the control of the property, or even informed them of it. 4. That though the legal estate was in the trustees, the actual ownership remained in the grantor. 5. That the deed professed to grant the property of which the maker should be possessed of at the time of his decease, which, otherwise than as a will, he could not not do. 6. That it contained a power of revocation by the most informal instrument; and, lastly, that the will, by referring to and confirming the deed, threw a testamentary character over the whole.

Observations upon Attorney General v. *Jones*.]—Now with respect to the first circumstance, viz., the consideration being a mere nominal one—that, instead of conferring a testamentary character on the instrument, discloses a directly contrary intention, it being altogether inconsistent with a will to mention any consideration whatever, although

(1) The property above enumerated in italics was incapable of passing by a deed of settlement, which is only capable of comprehending such property as the settlor is possessed of at the time he executes it.

it is rarely omitted in a deed, and in most instances forms one of its essential qualifications. All that can possibly be inferred from it is that the deed was made upon a voluntary, and not upon a good or valuable, consideration. Neither, as a learned writer when treating on this subject observes (1 Jarm. on Wills, 17), do the arguments founded upon the retention of the deed appear to be more convincing; for though these circumstances are very often important when the claims of creditors and purchasers are under consideration, yet it has never been ruled that, in order to render a settlement binding on a settlor's own representatives, the deed must be disclosed, and the possession of the property relinquished by him. Nor can we see how, upon any legal principle, it could be held that no estate passed upon which the deed was to operate in the settlor's lifetime, when, in point of fact, the whole legal estate, all the estate that a court of law could recognize, actually passed out of the settlor, and became instantly vested in the trustees. In case of the settlor being ousted from the property, the trustees alone could have brought ejectment for its recovery, and, in reality, upon their legal title only, they might have entered upon and ejected the very settlor himself. Was there ever a case, as Mr. Baron Wood aptly remarked, where an estate passed by will in the lifetime of the testator? and yet here the whole legal estate actually passed in the settlor's lifetime. As to the circumstance of the settlor intending to include the whole of the property he might be possessed of at the time of his death, that only tends to show that he wished to include more than the deed was capable of embracing, and not that he meant to resort to another mode of disposition. Nor does the mere fact of referring to the deed by the will afford any inference of a design to throw a testamentary character over the whole course of proceeding; for how often do testators refer to deeds for the purpose of confirming some antecedent disposition of property by those instruments. And with respect to the power of revocation, the insertion of such a clause, so far from indicating an intention to make a will, discloses a totally different intent; for a will being of an ambulatory nature, no clause of revocation is necessary to render it revocable, whereas such clause is absolutely necessary to render a deed so. "Suppose," as Baron Wood remarked, "there had been no power of revocation, would it not have been valid as a deed? and suppose, in that case, the party had made a will disposing of the property differently, that will would not avail against the deed; but the deed, notwithstanding the alteration of the will, if he had not reserved the power, would

prevail against the will. That shows it is a deed. If, on the other hand, he had made a will, and then another, the second would have been a revocation of the first." And in a subsequent case (*Thomson* v. *Browne*, 3 Myl. & Kee.), Lord Cottenham, then Sir C. C. Pepys, M. R., alluding to *Attorney General* v. *Jones*, observed, "that if there be anything in the decision to support the notion, that where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation in such a deed alters the character of the instrument, and renders it testamentary, I can only say that if this were law, a great number of transactions, the validity of which have never been doubted, would be liable to be impeached." And in the case last referred to, notwithstanding the settlor had reserved to himself a power to revoke the trusts therein declared, and to appoint others in lieu thereof, his honour decided that the instrument was not thereby rendered testamentary.

Reservation of power of revocation insufficient to render a voluntary settlement testamentary.]—It seems perfectly clear, therefore, that the circumstance of a power of revocation being reserved to the settlor, will not render the deed testamentary, and it is also equally clear that the insertion of trusts to pay certain sums of money in the same form as in a will, does not confer a testamentary character upon the instrument. There is, however, one great drawback to a deed of gift, as an effectual and complete disposition, which is, that it is only capable of comprehending such property as the settlor is possessed of at the time he executes it, which renders it unadapted to the settlement of every kind of property that is of a changeable or fluctuating nature, or to any after-acquired property the settlor may afterwards possess, and often causes a question to arise as to what particular items of the settlor's property, to which the words in the description in the settlement may be applicable, actually pass under it. The best way of avoiding these evils is to have a schedule or inventory made out at the time the deed is executed, in which should be set out the several articles it is designed to comprehend. This schedule or inventory may be either indorsed upon the deed of settlement, or referred to in it. And in order to carry out the object to its fullest extent, the settlement should be accompanied by a will, in which the settlement and its object should be recited; which object should be perfected by bequeathing by the will all such articles as the deed was incapable of comprehending, and

these it may be declared shall be held upon the same trusts as those limited by the deed itself.

How a deed of post-nuptial settlement should be penned.]—A deed of post-nuptial or voluntary settlement, where the objects are the same, is penned in much the same manner as an ordinary marriage settlement.

Parties.] — The usual parties are the settlor and the trustees of the settlement; but the parties taking beneficially under it are seldom named as parties in the premises of the deed, even where the settlor's wife forms one of them, in which respect this mode of assurance differs from a regular marriage settlement, in which the wife is always named as one of the parties.

Recitals.]—Recitals are not often introduced beyond the simple recital that the settlor is desirous of making the settlement (see the form 1 Con. Prec., Part IV., Section III., No. I., clause 2, p. 759, 2nd edit.), but this recital is very often omitted. Where, however, any portion of the settled property consists of stock in the public funds, which has been transferred into the names of the trustees of the settlement, it is usual and proper to recite that circumstance: (see the form 1 Con. Prec., Part IV., Section III., No. III., clauses 2, 3, and 4, pp. 769, 770, 2nd edit.) And where the settlor derives his power of disposition by means of a power of appointment, it will be proper either to recite, or at any rate to refer to, the instrument creating such power, but which, whenever brevity is an object, may be done very shortly in the testatum clause of the deed of settlement in the manner we have already pointed out: (see *ante*, p. 204.)

Testatum clause.]—Where the settlement is in favour of the settlor's wife and children, it will be sufficient to state the consideration to be the natural love and affection which the settlor bears towards those members of his family, which forms a good, though not a valuable, consideration; but it is the usual practice to express also in this, and ought always to be done in all other cases, a nominal pecuniary consideration; as that five or ten shillings has been paid to the settlor by the trustees of the settlement in consideration of which the former conveys or assigns the settled premises to them, to hold to the uses, or upon the trusts, of such settlement.

Operative words, description of parcels, general words, &c.]

—The operative words are the same, and the parcels and general words should be set out and inserted in precisely the same manner as in an ordinary deed of marriage settlement.

Habendum.]—In the habendum clause, in deeds of voluntary settlement of real property in which the settlor intends to retain the beneficial ownership during his lifetime, cautious practitioners have been in the habit of vesting the use in the trustees of the settlement for the purpose of obviating any objections that might be raised to the operation of the instrument on the ground that no estate actually passed from the settlor; but such a course was wholly unnecessary; for a voluntary settlement will be quite as valid, and just as readily avoided by him, so far as his powers of avoiding it extend, whether he takes a legal, or a mere equitable estate under it, and will be equally binding as against subsequent creditors in the one case as the other.

As to powers of appointment under voluntary settlements.]—In voluntary settlements it is also a common practice to limit an absolute power of appointment to the settlor, the other limitations in the settlement being only to take effect in default of appointment. By adopting this course, most, if not all, the objects of a power of revocation might be obtained; and thus that clause might be dispensed with, and the settlor still preserve an absolute power of disposition over the settled property, if there really was, but which in fact there is not, any objection to retaining the revoking power, on the ground of its conferring a testamentary operation upon the instrument. But even without any power of revocation, or the reservation of any power of appointment over the property, it is in the settlor's power at any time to defeat the settlement by selling such property to a *bonâ fide purchaser* for valuable consideration; and as the statute 27 Eliz. c. 4, expressly declares all voluntary conveyances to be void as against such purchasers, it will be perfectly immaterial whether the purchasers have, or have not, any notice of the settlement (*Metcalf* v. *Pulvertoft*, 1 Ves. & Bea. 84), the statute receiving the same construction in courts of equity as in courts of law, and comprehending copyhold as well as freehold property: (*Currie* v. *Hind*, 1 Myl. & Cra. 580.) So, where a power is exercised under a voluntary settlement, and that power is afterwards executed for a valuable consideration, the purchaser will have the benefit of it: (*Hart* v. *Middlehurst*, 3 Atk. 377.) Neither is it necessary, in order to enable a purchaser to

take the benefit of the above-mentioned statute, that the legal estate should have been actually conveyed to him; for an equitable interest entitling a party by contract to clothe it with a legal title makes such a party a purchaser in the eye of a court of equity: (*Buckle* v. *Mitchell*, 18 Ves. 110.) And, notwithstanding a contrary doctrine not long since prevailed (*Kerson* v. *Domer*, 9 Bing. 76), it has been since decided (*Lister* v. *Turner*, 7 L. T. Rep. 3), that where the title deeds are deposited by way of security with a banker, the latter will be considered as a purchaser within the meaning of the statute, and consequently as such be entitled to avoid the settlement. But it has been recently held, that a judgment creditor is not a purchaser for valuable consideration within the statute: (*Beavan* v. *Earl of Oxford*, 26 L. T. Rep. 277.) Nor will a settlor be allowed to defeat the settlement by a subsequent voluntary settlement, or upon a mere nominal consideration, unless he has reserved to himself a power of revocation by the prior settlement: (*Roe* v. *Routlege*, Cowp. 705.)

How deed should be penned when designed to have the operation of a will.]—Where the settlement is designed to stand in the place of a will, the trustees are frequently directed to apply a portion of the trust moneys in discharge of the settlor's debts and funeral expenses, and also to pay certain sums of money to the several persons therein named, in the same manner as trusts for the payment of legacies are declared in an ordinary will: (see the form 1 Con. Prec., Part III., Section III., No. VI., clause 10, p. 794, 2nd edit.) In like manner also, substituted trusts may be declared of gifts made to parties to take effect after the settlor's decease, where the parties in whose favour they are made chance to die in his lifetime, and it may be declared that the same shall fall into and become part of a residuary trust fund: (see the form 1 Con. Prec., Part IV., Sect. III., No. VI., clause 11, p. 794, 2nd edit.)

Power to change trustees, and authorizing trustees to give receipts.]—Power to change trustees, and authorizing trustees to give receipts, should be inserted in precisely the same manner as in a regular marriage settlement.

CHAPTER IV.

SEPARATION DEEDS.

Deeds of separation between husband and wife have been looked upon with an unfavourable eye by the courts both of law and equity, as being contrary to the policy of the law which fixes the duties of domestic life. Still, for all this, courts, both of law and equity, have determined in favour of the validity of settlements of this nature. The ecclesiastical courts, however, still refuse to uphold such an arrangement, or to recognize a contract for future separation to be binding, as this would be to establish a peculiar and anomalous species of divorce. On this account, therefore, it seems that such a deed could not be pleaded in bar in a suit in the ecclesiastical court for a restitution of conjugal rights: (*St. John* v. *St. John*, 11 Ves. 530.) Still, if a husband should so proceed in opposition to his agreement not to do so, a court of equity would restrain him by injunction (1 Jac. 140), although it would be otherwise if the wife were to sue the husband; as she can neither enter into a contract, or execute a deed; the husband's only protection in such a case is to have a covenant from the trustees of the separation deed, indemnifying him from any proceedings instituted by her for the above purposes, and to proceed against the trustees upon such covenant in case of her instituting any such proceedings against him.

Husband should be indemnified against the wife's debts, &c.] —In addition to the above-mentioned covenant, the deed ought also to contain a covenant, either from the trustees, or some friend or relation of the wife, to indemnify the husband against any debts or liabilities his wife may contract or incur, and for which he may become in any way responsible.

This is, indeed, essential to the complete validity of the settlement; for unless either a covenant to the above effect, or some other sufficient or valuable consideration, be inserted, the deed of settlement will be considered on the same footing as any other deed of voluntary settlement, and, as such, be liable to be avoided by either creditors or subsequent purchasers. But if such a covenant of indemnity be inserted, it will be considered as a valuable consideration, and render the deed effectual both as against creditors and purchasers. It will be the duty, therefore, of the solicitors acting on behalf of both the parties, to see that this clause is inserted in the separation deed; on the one side, for the purpose of indemnifying the husband against his wife's future debts or liabilities, and on the other, to give complete efficacy to the deed by conferring such a valuable consideration as will render it effectual, not only as against the husband himself, but also all other persons rightfully claiming through or under him: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause 9, p. 805, 2nd edit.)

Objects to be embraced in a separation deed.]—The objects of deeds of the above kind, therefore, appear to be—1, to sanction the parties to live separate and apart from each other; 2, to make a provision for their separate maintenance during such separation; and 3, as far as the husband is concerned, to indemnify him against any debts or liabilities his wife may incur, and for which he may be in any way liable on her account.

As to settlement of future property of the wife.]—Before executing an instrument of this kind, it will be proper for the parties acting on behalf of the wife to come to a proper understanding with the husband respecting any future property the wife may acquire, and whether or not the husband is to have any benefit from it, and, if so, whether he is to enjoy it to the full extent the law would confer it upon him; or if not, or in case he is to derive no benefit from it whatever, then an express provision to that effect should be inserted in the deed; in addition to which, in the latter case, the husband should be made to enter into a covenant to execute all such assurances as may be necessary for vesting such after-acquired property, and the absolute power of disposition over the same in the wife, or her trustees, or such other persons as she may think proper to appoint: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clauses 5 and 6, p. 803, 2nd edit.; *id. ib.* clauses A. and B.)

Proper parties to be named in the deed.]—The proper parties to a deed of this kind are generally the husband, wife, and the trustees of the settlement, and oftentimes some friend or relation of the wife also concurs in the settlement, for the purpose of indemnifying the husband against his wife's debts and liabilities, or any proceedings which she may institute in the ecclesiastical courts for a restoration of conjugal rights. It is always proper to name the wife as a party; for, notwithstanding she cannot be legally bound by it, it will at any rate show that she was in fact a concurring party to the settlement, and that it was made and entered into with her full knowledge and approbation.

Recitals.]—It is usual in separation deeds to recite that differences have arisen between the husband and wife, in consequence of which they have agreed to live separate from each other; and where, as is commonly the case, the separate maintenance of the wife is to consist of an annual allowance, the deed seldom contains any further recitals: (see the form 1 Con. Prec., Part IV., No. IV., clause 2, p. 802, 2nd edit.) But in some particular cases, as, for example, where stock in the public funds is set apart for the purpose of affording the income of the wife's separate maintenance, and in which case the stock is usually transferred into the names of the trustees of the settlement, it will be proper to recite such intended provision, and also the transfer of the stock: (see the form 1 Con. Prec., Part IV., Section IV., No. III., clause 2, p. 815, 2nd edit.) Recitals to the same effect will also become requisite when a sum of money is paid into the hands of the trustees upon trust to invest for a similar purpose: (see the form 1 Con. Prec., Part IV., Section IV., No. IV., clause 3, p. 821, 2nd edit.) And where the property which is to form a fund for the separate maintenance consists of property included in the marriage settlement of the husband and wife, it will then become necessary to recite such marriage settlement, and to show by such recital that the parties possess a sufficient power over the settled property to apply it to the purposes of the present deed: (see forms of recitals of this kind, 1 Con. Prec., Part IV., Section IV., No. V., clause 2, p. 824, 2nd edit.; *id. ib.* No. VI., clause 6, p. 828.) In cases, also, where any arrangement is to be made as to the custody or disposal of the children of the marriage, it will be proper to recite those arrangements, and also the manner in which they are intended to be carried out.

Operative part of the deed.]—Separation deeds generally contain at least three testatum clauses. By the first, the husband covenants to live separate and apart from his wife; by the second, the property is settled for their separate maintenance; and by the third, the husband is indemnified against all debts or liabilities incurred by the wife; and where various kinds of property are settled for raising such maintenance; as freehold and leasehold estates, household furniture and effects, it is often found necessary to employ several additional and distinct testatum clauses, adapted to each particular description of property so settled: (see the forms 1 Con. Prec., Part IV., Section IV., No. III., clauses 3, 7, and 10, pp. 815, 816, 817, 2nd edit.)

Testatum by which husband covenants to live separate from the wife.]—In the testatum clause by which the husband agrees to live separate and apart from his wife, the covenant must be entered into with the trustees, or some friend or relation of the wife; and though it is proper to name the wife as a party to the deed, for the reasons we have previously given, it would be irregular to make her an actual contracting party to a settlement upon which her acts could have no effect or operation, either at law or in equity. By the covenant above-mentioned, the husband should covenant that his wife may live apart from him in the same manner as if she were sole and unmarried, and that he will not compel her to cohabit or live with him by any ecclesiastical censure, or any other proceedings whatsoever, or prosecute any person for harbouring or protecting her, or in any way interfere with her or disturb her in her way of living: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause 3, p. 802, 2nd edit.)

As to wife's paraphernalia.]—In addition to this, the husband generally covenants that his wife may hold and possess her clothes, jewels, and other paraphernalia, for her separate use, and dispose of the same in the same manner as if she were sole.

As to wife's future property.]—If the wife is to have the free disposal of any future-acquired property, the husband must enter into a covenant accordingly; and whenever it is probable the wife may succeed to any real estate, in order to confer an absolute disposal over this property upon her, it will be advisable to insert a special covenant from the husband that in case any such real estate shall at any time during

the joint lives of the said husband and wife happen to be given or devised unto, or in any way devolve upon her, or upon him in her right, that he, at the request and costs of the wife, will execute all such assurances for conveying the premises to such uses as she, notwithstanding her coverture, may appoint: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause A., *in notis*, p. 803, 2nd edit.) Besides which, unless, which under circumstances like these rarely happens, it is intended the husband shall become tenant by the curtesy in case he should survive his wife, it will be necessary to insert a covenant from him not to claim any such estate; and also, at the expense and costs of the wife's heir, to release to the latter all his estate in the premises as such tenant by the curtesy as aforesaid: (*id. ib.* clause B., *in notis*, p. 804.)

Testatum by which the property for separate maintenance is settled.]—The usual settlement of allowance for separate maintenance of the wife is by an annual payment, either in the shape of a rentcharge, or annuity charged upon real or personal property, or arising out of the dividends of stock, or resting only on the mere personal covenant of the husband. In either case, the husband covenants with the trustees to pay the yearly sum at certain stated periods; usually by four equal quarterly payments, which he covenants to pay into the hands of the trustees. This is followed by a declaration of trust, by which it is declared that the trustees are to stand possessed of the same for the wife's separate use: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause 8, p. 805, 2nd edit.)

Where the annuity is charged upon real estate.]—Where an annuity for his wife's separate maintenance is charged on real estate, the usual mode is to grant the annuity to the trustees of the settlement for a term of ninety-nine years, determinable on the wife's decease, with powers of distress and entry; and by a further testatum, the husband demises the premises charged with the annuity to the same trustees for a long term of years, as 500 or 1,000 years, upon trust to permit the husband to receive the rents until the annuity shall be in arrear, and then by mortgage or sale to raise the same. This is followed by a covenant from the husband to the trustees for payment of the annuity; that he has good right to charge the annuity on the demised premises, and that the premises shall remain charged with the same accordingly, free from all incumbrances, and for further assurance:

(see the form 1 Con. Prec., Part IV., Section IV., No. II., pp. 808, 813, 2nd edit.)

Where separate maintenance is charged upon stock in the funds.]—Where the separate maintenance is charged upon stock in any of the public funds, and such stock has been transferred into the names of the trustees, after reciting that fact, and the objects of the present settlement, it is declared by the testatum clause that the trustees are to stand possessed of the stock, upon trust to pay the dividends to the wife during her life for her sole and separate use, and after her decease, upon such trusts as the husband shall appoint, or upon trust for him absolutely, or in case of his decease, upon trust for his next of kin: (see the form 1 Con. Prec., Part IV., Section IV., No. III., clauses 3, 4, and 5, pp. 815, 816, 2nd edit.)

Where money is paid to trustees to invest upon trust for wife's separate maintenance.]—In cases where a sum of money is paid into the hands of trustees for the purpose of being invested by them, in order to supply a fund for the wife's separate maintenance, it should be declared by the testatum clause that the trustees are to stand possessed of such moneys upon trust to invest the same in real, or government or other securities, with power of varying such securities, and to apply the dividends for the wife's separate maintenance in the same manner as the dividends of the stock just before mentioned are directed to be applied.

Where the separate maintenance is charged upon or made up out of mixed kinds of property.]—It often happens that a wife's separate maintenance is made up out of mixed kinds of property; sometimes, besides an annuity or some other yearly payment, the provision is made up by her being allowed to reside in some mansion house of the husband, or to have the use of some of his household furniture and effects, in which case, additional testatum clauses will become necessary to settle all these various kinds of property in a correct and proper manner. Thus, for example, suppose the provision is made by payment of the dividends of stock, the occupation or profits of a dwelling-house, and the use of the household furniture therein, the proper mode of penning the settlement will be, by the first testatum to declare the trusts of the stock for the wife's separate use for her life; by the second testatum, to demise the dwelling-house to the trustees, To hold to them for a term of years determinable on the wife's

decease, upon trust for the wife for life for her sole and separate use; and by the third testatum, to assign to the same trustees all the household furniture contained in the house, To HOLD to them upon trust for the sole and separate use of the wife during her life, and after her decease upon trust for the husband absolutely: (see the form 1 Con. Prec., Part IV., Section IV., No. III., clauses 3 to 13 inclusive, pp. 815, 818, 2nd edit.)

Where part of wife's property is settled for the separate maintenance of the husband.]—It sometimes happens, that upon a separation between a husband and wife a provision is made for the separate maintenance of the husband out of the wife's property previously settled to her separate use. Whenever this occurs, the best plan will be, after reciting the deed or other instrument in which the property was so settled to the wife's separate use, and the agreement for a separation, for the wife to exercise her power of appointment, by which she makes the appointment in her husband's favour, who, in consideration thereof, must covenant to live separate and apart from her, and allow her to possess her paraphernalia, as also all such real or personal estate as she may afterwards acquire, free from his control, and dispose of the same in such manner as she may think proper; and that he will enter into all such assurances as may be necessary for any of the above purposes, or for confirming the settlement; followed by a proviso for determining his interest upon any breach of covenant on his part. To this is sometimes added a clause, that on breach of any covenants entered into by him he shall pay some certain stipulated sum in the nature of liquidated damages, to be settled to the wife's sole and separate use. In addition to the above-mentioned covenants, the husband is also sometimes made to enter into a covenant that he will not come to the wife's place of residence, or to any place within a certain distance of the same: (see the form 1 Con. Prec., Part IV., Section IV., No. VI., pp. 828, 832, 2nd edit.)

Where separate maintenance of wife is made dependent upon her maintaining the children of the marriage.]—Where the wife, upon a separation from her husband, is to have the care and disposal of any children of the marriage, the payment of her separate maintenance is oftentimes made dependent upon her maintaining and supporting such children during the period of separation. To accomplish this object, the proper way seems to be to declare that the trustees shall

pay the allowance to the wife so long as she shall support the children, pay her debts, and refrain from molesting her husband; but that in case she shall fail to perform all these conditions, the trustees shall apply a sufficient portion of her allowance for the purpose of indemnifying the husband, and devote the residue to the support of the wife and children: (see the form 1 Con. Prec., Part IV., Section IV., No. IV., clauses 4 to 8 inclusive, pp. 821, 822, 2nd edit.)

Clause against alienation.]—If the wife, as is almost universally the case, is intended to be restrained from alienating her separate maintenance, a clause to that effect will be necessary; for, notwithstanding it has been held (*Hyde* v. *Price*, 3 Ves. 437) that such a provision is inalienable, without any restraining clause to that effect, it has been since decided that a clause to that effect is necessary to control the right of alienation; (*Acton* v. *Smith*, 1 Sim. & Stu. 429.)

As to the indemnity clauses.]—By the indemnity clauses, either the trustees of the settlement, or some friend or relation acting on behalf of the wife, covenant with the husband to indemnify him against any liability for her support or maintenance, or on account of any of her debts, whether present or future; and that the wife shall not institute any proceedings to compel the husband to cohabit with her. Besides these things, it is also generally covenanted that the wife will release her dower, freebench and thirds: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clauses 9, 10, 11, pp. 805, 806, 2nd edit.)

Covenants should be joint and several covenants.]—If two persons, or more, enter into the covenants of indemnity with the husband, such covenants should be joint and several, and not several covenants only: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause 9, p. 805, 2nd edit.)

Proviso for avoiding the covenants entered into by trustees on breach of any of the covenants on the part of the husband.] —A proviso is frequently inserted at the end of the deed, that, on breach of any of the covenants by the husband, the trustees shall be released from all the covenants they have entered into on behalf of the wife: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause D., *in notis*, p. 807, 2nd edit.)

Husband, on breach of covenant, to pay a certain sum by way of liquidated damages.]—Another clause sometimes also introduced is, that the husband, on breach of covenant, shall pay some certain specified sum to the trustees in the shape of liquidated damages, to be held by them upon trust for the sole and separate use of the wife, and to be disposed of in such manner as she shall, notwithstanding her coverture, by deed or will appoint. In penning this clause, for the reasons before pointed out (*ante*, p. 70), care must be taken to make the payment in the shape of liquidated damages, and not by way of penalty, in which case the whole sum mentioned, and no lesser amount, will be recoverable against the husband; whereas, if payable in the shape of a penalty, a far smaller sum may be recovered from him: (see the form 1 Con. Prec., Part IV., Section IV., No. I., clause C., *in notis*, p. 805, 2nd edit.)

Proviso for determining the settlement in case the wife shall commit adultery.]—Sometimes a proviso is inserted that the settlement shall be void in case the wife shall at any time commit adultery; but this clause is generally objected to by the friends or relations of the wife, not on the ground of her being likely to forfeit the benefit of the provision made for her by the commission of a crime of that nature, but that the very suggestion of her being likely to be guilty of such an offence must necessarily tend to cast a gross and unjust imputation on her character; still, without an insertion of a clause of the above kind, any provision made for her separate maintenance will not be determined by her subsequent adultery: (*Seagrave* v. *Seagrave*, 13 Ves. 413; *Jee* v. *Thurlow*, 2 B. & C. 553; S. C., 4 Dow. & Ry. 13.)

Power to change trustees.]—A power to change and appoint new trustees should always be inserted (see the form 1 Con. Prec., Part IV., Section II., No. IV., clause 16, p. 706, 2nd edit.); as also a declaration that receipts of wife and trustees shall be sufficient discharges (*ib. id.* Sect. IV., No. III., clause 16, p. 818, 2nd edit.); and that the trustees shall be authorized to retain any costs they may incur in the execution of the trusts out of any of the trust moneys that may come into their hands: (see the form 1 Con. Prec., Part IV., Section IV., No. III., clause 17, p. 819, 2nd edit.)

By what acts a deed of separation may be avoided.]—In order to support a deed for separate maintenance, it is necessary that it should be totally free from fraud; for if

made under any circumstances indicating fraud, as in the prospect of bankruptcy, it would be set aside in equity. And where a deed of separation is executed during cohabitation, and not intended to be followed by an immediate separation, it has been held void: (*Hindley* v. *Lord Westmeath*, 6 B. & C. 200.) Still, it has been held (*Rodney* v. *Chambers*, 2 East, 283), that a provision for future separation, which is made dependent on the approbation of trustees, is not void. If the husband and wife, after a separation, are reconciled and live together again, it seems that those acts will avoid the deed: (*St. John* v. *St. John*, 11 Ves. 536.) But in a case where it was expressly provided that the separate maintenance should continue until the parties should agree to cohabit and live together again, to be testified by some writing under their hands, it was held that future cohabitation, without such agreement in writing, did not determine the settlement: (*Gawdon* v. *Draper*, 2 Ventr. 217.)

As to separation deeds between parties who have cohabited together, but are not lawfully married.]—Deeds of separation are not solely confined to separations by husband and wife, for they are sometimes resorted to in cases where a man and woman have been cohabiting together without having gone through the marriage ceremony. Arrangements of the latter kind are sometimes carried out by a deed of covenant, and sometimes by a bond, by which the gentleman binds himself in a sufficient penalty to pay the lady either a certain specified sum, or an annual payment for some stated period.

Distinction between a bond given in consideration of future and past cohabitation.]—In the case of bonds given to a kept mistress, a distinction has been taken as to whether such bonds were in consideration of present or future cohabitation. If given in consideration of future cohabitation, such assurances are invalid, as being *contra bonos mores*, and holding an inducement to crime: (*Rex* v. *North Wingfield*, 1 B. & Ad. 912.) But when given in consideration of past cohabitation, the transaction is viewed in a totally different light; for in the latter case, so far from holding out an inducement to crime, it affords the erring female the means of leading a more virtuous life for the time to come (*Turner* v. *Vaughan*, 2 Wils. 339); nor will the conduct of a woman, however abandoned, invalidate a bond given for past cohabitation (*Hill* v. *Spencer*, Amb. 641); neither will the fact of her having had a criminal connection with another man after she was taken in keeping avoid the security: (*ib.*) A different

doctrine from that above laid down seems, however, at one time to have prevailed in equity, where, if it had been charged in a bill that the defendant was a common prostitute, and had drawn on the obligor to give the security, the court would have relieved against it: (*Whaley* v. *Norton*, 1 Vern. 484.) Still, it appears that in most of these cases the ground of relief was founded upon the circumstances of the securities having been given previously to the cohabitation, which, being a consideration of a criminal nature, the court was bound to relieve against; but however severely courts of equity might formerly have looked upon securities of this kind, they have latterly refused to relieve an obligor against a bond given for past cohabitation, on the ground already stated, that such a provision enables a woman in such an unfortunate situation to lead a life more conducive to her happiness, and to public morality: (*Bainham* v. *Manning*, 2 Vern. 242; *Gray* v. *Mathias*, 5 Ves. 286.) Courts of equity also formerly, even in cases where they would not relieve the obligor himself, would have afforded this relief to his representatives: (*Mathews* v. *Henbury*, 2 Vern. 187.) But it does not seem that this distinction would be now recognized, and that where relief would be refused to the party himself, it would not be afforded at the request of his representatives, however far the court, under the circumstances of the case, might refuse to assist the party claiming under the bond. And it seems that equity will in no case relieve the obligor on his own application: (*Spicer* v. *Hayward*, Pre. Cha. 114.)

Whether equity will refuse to assist the woman on the ground of the obligor being a married man.]—But although courts of equity will not relieve the obligor upon his own application, they would not formerly have lent their aid to enforce the securities where the consideration for past cohabitation was with a married man, and the woman herself was aware of that fact (*Priest* v. *Parrot*, 2 Ves. 160), although it was otherwise where she was unaware of the circumstance of the man being married (*Annandale* v. *Harris*, 2 P. Wms. 432; 3 Bro. P. C. 443); but in a modern case in which the question arose, the Vice-Chancellor sent a case to the King's Bench to inquire whether the circumstance of the defendant being a married man was a good defence at law to an action on such a bond, when that court certified that it was not a good defence; so that the distinction as above stated may now be considered as exploded: (*Nyne* v. *Moseley*, 6 B. & C. 133; S. C., 9 D. & R. 165; 2 Sim. 161.)

Where fraud has been practised upon a woman, equity will relieve her.]—And in all cases where any fraud has been practised upon the woman, equity will relieve her. As, where a man having debauched a young female, and intending afterwards to deceive her, made a settlement upon her of 30*l.* a-year for life out of an estate not belonging to him, the court decreed him to make it good out of an estate which was his own property; and this decree was afterwards confirmed upon appeal to the House of Lords: (*Carew* v. *Stafford*, 1 Eq. Ca. Abr., 427.) So, where Sir W. B., having seduced Mrs. Ord, then a young lady of about fourteen years of age, of a good family, and entitled to 1200*l.* fortune, settled upon her 360*l.* per annum for years, but upon an encumbered estate, and Mrs. Ord dying, her administrator brought a bill in order to disencumber the land which was charged with the annuity, and was relieved accordingly: (*Ord* v. *Blackett*, 2 P. Wms. 433.)

Bonds of the above kind being purely voluntary, the payment of them will be postponed in favour of creditors, but not of legatees.]—But bonds of the above kind being purely voluntary, the payment of them will be postponed until all the obligor's creditors, as well those by simple as by specialty, are fully satisfied; but if the personal estate proves insufficient to discharge such bonds, they must be paid out of the real estate, if there be any: (*Jones* v. *Powell*, 1 Eq. Ca. Abr. 84, pl. 2.) And bonds of this nature will be entitled to priority in payment to legacies, for in the former instance the right is transferred in the obligor's lifetime, whereas, in the case of the legacies, such right does not accrue until his death; and as both species of gifts are voluntary, so, according to the long-established maxim, "*qui prior est tempore potior est jure*," the right which does not arise until the testator's death, must be postponed to a right created in his lifetime: (*Fairefeard* v. *Bowers*, 2 Vern. 202; *Jones* v. *Powell*, *supra.*)

How bonds of the above kind are usually penned.]—Bonds given for the above-mentioned purposes usually recite that the obligor and lady, having lived together, mutually agree to live separate from each other, and that the obligor has agreed to make a settlement on the lady, setting out at the same time the nature of the settlement, with a condition for avoiding the bond in case the obligor carries out the settlement accordingly: (see the form 1 Con. Prec., Part IV., Section IV., No. IX., clauses 1, 2, and 3, pp. 844, 845,

2nd edit.) Sometimes the payments of the allowance to the lady are restricted to such time only as she shall remain single, or until she shall attempt to dispose of such payments by way of anticipation (*id. ib.* clause 4, p. 485); sometimes it is made conditional on her leaving the neighbourhood, or not coming into that in which the obligor resides, or so long as she shall abstain from making any other demand upon him beyond that which is secured to her by the bond; any of which acts on her part are to render the bond void: (*id. ib.* clause 4.) In some instances, instead of the payments being made to cease upon the lady's marriage, such payments are directed to be made to her separate use; but it is generally provided that she is to have no power of anticipating the growing payments, and that on attempting to do so, she is to forfeit all benefit under the bond: (see the form 1 Con. Prec., Part IV., Section IV., No. X., clauses 4 and 5, pp. 847, 848, 2nd edit.)

Where the provision is by way of covenant.]—Where the provision is made by way of covenant, the deed is penned in the same manner as an ordinary deed of separation between husband and wife; and the allowance to her is provided for in the same manner as where such provision is secured by bond: (see the form 1 Con. Prec., Part IV., Section IV., No. VII., pp. 833, 836.) But where the gentleman is in nowise liable for the lady's debts, no clause of indemnity is necessary to protect him from any claims of that nature, consequently no clause of that kind usually is, or ought to be, inserted in the deed.

Where a provision is also made for natural children.]—It sometimes occurs, that in addition to the allowance for the maintenance of the lady, the same instrument contains a provision for her natural children, which is effected in precisely the same way as a settlor would provide for his lawful children by a marriage or post-nuptial settlement, and the deed contains the same clauses, authorizing the appointment of new trustees, and indemnity to purchasers and trustees, as in either of the two above-mentioned kinds of settlements: (see the form 1 Con. Prec., Part IV., Section IV., No. VIII., pp. 837, 841, 2nd edit.)

CHAPTER V.

STAMP DUTIES ON SETTLEMENTS.

Ad valorem duties were first charged upon settlements by the General Stamp Act (55 Geo. 3, c. 184), by which a duty commencing at 1*l.* 15*s.* was imposed on the settlement of any money or stock on sums exceeding 100*l.* and not amounting to 1,000*l.*, and gradually increasing until the duties arrived at the sum of 25*l.*, which was the highest rate of duty charged upon settlements. The new duty under the act 13 & 14 Vict. c. 97, is at the rate of 5*s.* upon every 100*l.*, and is therefore a considerable increase upon sums exceeding 700*l.*, whilst upon sums below that amount there is, as there ought always to have been, a reduction of the duty, which is now assessed upon a fairly graduated scale, as may be perceived by the following comparative table of the old and new duties.(1)

Settlement of any Sum of Money or Stock.

	Old duty. £ s. d.	New duty.
Not exceeding 100*l.* and not amounting to 1,000*l.*	1 13 0	5*s.* for every 100*l.* and for any fractional part of 100*l.*
Amounting to 1,000 ,, 2,000	2 0 0	
,, 2,000 ,, 3,000	3 0 0	
,, 3,000 ,, 4,000	4 0 0	
,, 4,000 ,, 5,000	5 0 0	
,, 5,000 ,, 7,000	7 0 0	
,, 7,000 ,, 9,000	9 0 0	
,, 9,000 ,, 12,000	12 0 0	
,, 12,000 ,, 15,000	15 0 0	
,, 15,000 ,, 20,000	20 0 0	
,, 20,000........................	25 0 0	
And for any duplicate of the deed of settlement..	....	The same duty as on the original deed.

(1) Policies of assurance, when they form the subject-matter of a settlement, do not require an *ad valorem* stamp; and the proper stamp

Where any definite or certain sum of money or stock is settled.]—These duties are chargeable upon any deed or instrument, whether voluntary or gratuitous, or upon any good or valuable consideration other than a *bonâ fide* pecuniary consideration, whereby *any definite and certain principal sum or sums of money (whether charged or chargeable upon any lands or other hereditaments*, or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects, or not), or *any definite and certain share or shares* in any of the Government or Parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of any other company or corporation, shall be settled or agreed to be settled upon or for the benefit of any person or persons, either in possession or reversion, either absolutely or for life, or other partial interest, or in any other manner howsoever.

As to voluntary settlements.]—As voluntary settlements are expressly mentioned in the schedules annexed to both the acts, the same duties will attach upon those assurances as upon deeds of settlement made for a good or valuable consideration.

As to separation deeds.]—But a deed of separation by husband and wife falls within the head of "deeds not otherwise charged," unless provision be made out of any specific sum of money or stock thereby settled, in which latter case the stamp duties on a settlement will attach.

Where the instrument contains any other matters besides the settlement.]—And all deeds or instruments chargeable with the said *ad valorem* duty, which shall also contain any settlement of lands or any other property, or contain any other matter or thing besides the settlement, or such money or stock, shall be chargeable as any separate deed or instrument containing such settlement of lands or other property, or matter, or thing, would have been chargeable with, exclusive of the progressive duty: (stat. 14 & 15 Vict. c. 9, schedule.)

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will be the old 1*l.* 15*s.* common deed stamp, under the General Stamp Act (55 Geo. 3, c. 184), as a settlement of personal estate not consisting either of money or of stock, and therefore falling within the denomination of deed not otherwise provided for: (*Sainville* v. *Commissioners of Inland Revenue*, 23 L. T. Rep. 712; see also *Hughes* v. *King*, 1 Stark. 119; *Annandale* v. *Pattison*, 9 B. & C. 113.

Where there shall be more than one deed or instrument.]—And where there shall be more than one such deed or instrument for effecting any such settlement as aforesaid, chargeable with any such duty or duties exceeding 1*l.* 15*s.*, one of them only shall be charged with the said *ad valorem* duty; and also, where any settlement shall be made in pursuance of any previous articles chargeable with, and which shall have paid any such duty or duties exceeding 1*l.* 15*s.*, such last-mentioned settlement shall not be chargeable with the said *ad valorem* duty; and the said deeds or instruments respectively not chargeable with the said *ad valorem* duty, shall be charged with the duty to which the same may be liable under any more general description in the schedule annexed to the act (13 & 14 Vict. c. 97), or in the schedule annexed to the General Stamp Act (55 Geo. 3, c. 184); and on the whole being produced, duly executed and duly stamped, as thereby required, the latter shall also be stamped with a particular stamp for denoting or testifying the payment of the said *ad valorem* duty.

Where the settlement consists of real estate.]—Where real estate is settled, or where the subject-matter of the settlement is personal estate, not consisting of money or stock, the assurance will fall within the denomination of deed not otherwise provided for, and as such, will be liable to the common 1*l.* 15*s.* stamp duty. It seems, however, that if a deed of settlement contains a trust to raise any specific sum of money, an *ad valorem* duty on settlements to that amount will attach, for it then becomes a specific charge upon the lands, within the express words contained in the schedules annexed both to the old General Stamp Act (55 Geo. 3, c. 184), and to the more recent enactment of the 13 & 14 Vict. c. 97, under the head of "SETTLEMENT."

Declaration of uses and trusts.]—No mention is made of declarations of uses and trusts in the act of 13 & 14 Vict. c. 97, or in any subsequent enactment; consequently these duties remain still chargeable under the General Stamp Act (55 Geo. 3, c. 184), by which "all declarations of any use or trust, uses or trusts, of or concerning any estate or property, real or personal, where made by any writing, not being a deed or will, or otherwise charged in the schedule annexed to the said act," are charged with a duty of 1*l.* 15*s.*, but the progressive duties, if any, would be regulated by the act of 13 & 14 Vict. c. 97: (as to which see *ante*, p. 272.)

Partnership deeds.]—Partnership deeds are not expressly mentioned in any of the schedules annexed to the Stamp Acts, but at the same time, it is evident that no *ad valorem* duty will attach upon assurances of this nature, as no actual transfer of property is thereby made, consequently it appears that it falls within the description of "deeds not otherwise charged," and will therefore be chargeable with the common 1*l.* 15*s.* deed stamp under the General Stamp Act (55 Geo. 3, c. 184.)

Partition.]—Deeds of partition are still chargeable with the duties imposed by the General Stamp Act (55 Geo. 3, c. 184), by which any deed whereby any lands or other hereditaments or other heritable subjects in England or Scotland shall be conveyed, or any copyhold or customary lands in Scotland shall be conveyed, or any copyhold or customary lands in England shall be covenanted to be surrendered in order to effect a partition or division thereof amongst coparceners, joint tenants or tenants in common, or joint proprietors of any sort, where no sum of money, or a sum of money under 300*l.*, shall be paid for equality of partition, then the ordinary duty of 1*l.* 15*s.* will be chargeable, and where the sum given for such equality of partition shall amount to or exceed 300*l.*, the same *ad valorem* duty will be payable as on a conveyance on the sale of lands for a sum of money equal to the amount of the sum or sums so agreed to be paid; and so the law still continues, except that the amount of such *ad valorem* duties will now be regulated according to the scale of duties contained in the schedule annexed to the act 13 & 14 Vict. c. 97.

CHAPTER VI.

DECLARATIONS OF USES AND TRUSTS, AND OTHER INSTRUMENTS CONNECTED WITH SETTLEMENTS.

I. Declaration of Uses and Trusts.

In some particular modes of assurance, it becomes necessary to declare the uses or trusts by which the parties beneficially interested are to enjoy the property, by a distinct instrument from that by which the legal estate in the premises is conveyed; such, indeed, was the general practice in assurances through the medium of fines and recoveries, so long as those modes of assurance were employed, as is still adopted in the case of copyhold assurances, in which, if any uses or trusts are to be declared beyond a simple limitation in fee to the surrenderee, it is usual to do so by a separate instrument. Another instance also, in which it becomes necessary to declare the uses by a separate instrument, is where a trustee has taken a purchase in his own name, but with the moneys and for the benefit of his *cestui que trust*. In cases such as the last mentioned, the declaration of trust may be very concisely penned, and is usually effected by a deed-poll, by which the trustee testifies and declares the purchase moneys to have been paid by him, as the consideration for the purchase of the premises comprised in and conveyed to him by the purchase deed, was the proper moneys of the *cestui que trust* who had directed such

premises to be so conveyed. and that the trustee's name was only used as a trustee for the *cestui que trust*, who is the real purchaser. In addition to this, it is usual for the trustee to disclaim all beneficial interest, and also to covenant to convey the premises to the *cestui que trust*, or to such uses as he shall appoint, and in the meantime to stand possessed thereof for the benefit of *cestui que trust*, his heirs and assigns.

Disadvantages attendant to a purchaser who holds the purchased property under a simple declaration of trust.]—The objection to the above-mentioned plan is, that it leaves the legal estate in the trustees; whereas, generally speaking, it is more advantageous that the purchaser should have it vested in himself; and it will, therefore, usually be found advisable, where a purchase has been effected, and a conveyance taken in the name of a trustee, instead of a declaration of trust upon the plan just before mentioned, to make a regular conveyance to the actual purchaser by a regular deed of grant and release, and thus vest the whole legal fee in such actual purchaser, instead of leaving it outstanding in his trustee. This may be done by a very short form, which, if required, can be indorsed upon the previous deed of conveyance to the trustee. By this conveyance, after naming the parties (viz., the trustee and the *cestui que trust*), it should be recited shortly, that the consideration money was the proper moneys of the *cestui que trust*, and that the premises were conveyed to the trustee at his request and on his behalf, and that the trustee, at his request, was then prepared and had agreed to convey the same to his use. The trustee for a nominal pecuniary consideration must then convey the premises to the *cestui que trust*, which may be limited to him either in fee, or to uses to bar dower, where such limitations are requisite to debar a wife of that right. Where the conveyance is by indorsement on the preceding purchase deed, it will be unnecessary to set out a long description of the parcels; it being quite sufficient to refer to them by a short general description, and as being "the hereditaments and premises mentioned and comprised in the within written indenture." The trustee should covenant that he has done no act to incumber; but he cannot, and indeed ought not to, be called upon to enter into any further covenants.

As to copyholds.]—Where a purchase of copyholds has been taken in the name of a trustee, the proper way seems to be, after a short recital of the surrender and admission of the trustee to the copyhold premises, to declare that the

purchase moneys are the proper moneys of the real purchaser, and that the trustee's name was only used in the surrender and admission for the purchaser's benefit; and the trustee should then enter into a covenant to stand possessed of the copyhold premises upon trust for the purchaser, and to surrender and dispose of the same in such manner as he shall direct.

As to partitions, sales, or exchanges under powers.]—Where a partition, sale, or exchange is made in pursuance of any powers contained in any will or settlement, in order to perfect such assurances, it will be necessary to revoke the uses limited by the instrument creating such power, so far as they relate to the lands to be divided, exchanged, or sold, and either by the revoking, or some other instrument, to declare new uses respecting the same.

As to the revoking instrument.]—The instrument by which the uses are to be revoked should recite the instrument creating the powers of partition, sale, or exchange, or such of them as are intended to be exercised, and also the power of revoking the old uses and declaring the new.

Declaration of new uses.]—If the new uses are to be declared by a separate instrument, it will be necessary not only to recite the instrument creating the powers of partition, sale, or exchange, and to revoke the old and declare the new uses, but also to recite the instrument of revocation by which the old uses were revoked; but if the new uses are to be declared by the same instrument, then the latter recital would of course be superfluous. The agreement to make partition, sell, or exchange should then be inserted according to the circumstances of the case, the property should be conveyed, and the uses of it declared, as in any other ordinary case of partition, sale, or exchange for the benefit of the parties to whom such assurances are made.

As to the lands purchased or taken by way of exchange or partition.]—With respect to the lands to be purchased or taken in exchange, or by way of partition, two deeds ought to be employed. By the first, the conveyance, exchange, or partition should be made to the trustees of the settlement, to hold to them, their heirs and assigns, to the uses, or upon the trusts to be declared by the second instrument. By the latter, the original settlement should be recited, and the uses and trusts thereof fully and clearly set out, as also the

powers of partition, sale, and exchange, and power to revoke the old uses, and limit the new, for the purpose of perfecting the same. The exercise of the power containing the revoking of the old uses, and declaring of the new, should be then recited. It will then become necessary to recite the conveyance, appointment, or exchange made to or taken by the trustees of the premises, the uses of which are to be thereby declared, after which it must be declared that the trustees shall stand seised or possessed of the same, to such and the same uses, upon such and the same trusts, and for such and the same ends, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, declarations, and agreements, as were limited and declared in and by the original instrument of settlement, or such of them as are then subsisting and capable of taking effect.

Declaration of trust sometimes required to supply a defect or omission in some former instrument.]—A declaration of trust is also sometimes rendered necessary to supply a defect or omission contained in some preceding instrument. Thus, where a sum of money has been advanced by several trustees, out of trust moneys by way of mortgage, and the mortgage deed contains no declaration that such moneys have been advanced on a joint account, and are intended to be transmissible to the survivors, in case of the decease of either of them during the continuance of the mortgage security, the concurrence of the personal representatives of a deceased party would become necessary whenever the mortgage was paid off or transferred, in order to give such an effectual discharge for the mortgage money as a court of equity would consider to be binding and conclusive; for although, at law, where two or more persons advance money on a mortgage jointly, the whole debt will belong to the survivor; yet, in equity, it will only be treated as a tenancy in common, and the survivor, who takes the legal estate, will, in that court, be looked upon in the light of a trustee for the representatives of the deceased: (*Morley* v. *Bird*, 3 Ves. 631.) In all well penned mortgage deeds, therefore, where trust moneys are so advanced, a declaration to the effect above mentioned is always inserted: (see the form 1 Con. Prec., Part V., Section II., No. XIII., clause 7, p. 106, 2nd edit.) And in like manner, where a mortgage has been made to bankers to secure the balance of a banking account, it ought to be declared that all sums of money so advanced by the banking firm are to be considered as advanced on the

general partnership account, and in case of the death of either of them, to become payable to the survivor: (see the form 1 Con. Prec., Part V., Section II., No. XII., clause 9, p. 101, 2nd edit.) But sometimes the clause has been left out altogether, and its importance not discovered until the inconvenience from its omission has been really felt, in the necessity of being compelled to procure the concurrence of the personal representatives of some of the trustees who have died, and for which purpose it often becomes necessary to take out letters of administration to deceased's effects. The best way to set the matter right is, as soon as the defect is discovered, by a short deed of declaration of trust, in which the mortgage may be shortly recited, to declare that the moneys advanced on the mortgage are trust moneys advanced on a joint account, which, on the decease of either of the trustees during the continuance of the security, shall go over to the survivors, in the same form of words as it ought to have been set forth at the end of the mortgage deed, and this may properly be done by indorsement on the mortgage deed itself.

How defect may be best remedied when not discovered until the death of some of the trustees.]—But if, as sometimes happens, the defect is not discovered until some of the trustees have died, and whereby the equitable right to the deceased's interest in the mortgage money has become transmissible to his personal representatives, in that case, such representatives will become necessary parties to the declaration of the trust, and then, in addition to the mortgage assurance, it will be necessary to recite the death of the deceased trustee, as also the character in which his personal representatives stand, whether as executors or administrators; in the former case, it will be necessary to set out the date and probate of the will appointing the executors; and in the latter, the granting of the letters of administration, the time at which they were granted, and the court out of which they were issued. After which it should be recited, that the surviving trustees are the persons really entitled to receive the whole of the mortgage debt, but are unable in equity to give valid releases for the same, in consequence of the omission of the necessary stipulation to that effect; and then the personal representatives of the deceased trustee, and the surviving trustees, should testify and declare that the money therein mentioned to have been advanced was advanced by the trustees out of moneys belonging to them on a joint account, and that in the event

of the decease of either of them, which has now actually happened, by the death of the deceased trustee (*setting out the name*), his executors or administrators (*as the case may be, and setting out their names*), as his personal representatives, were to have no interest therein, but that the surviving trustees were to be entitled to the whole of such trust moneys.

As to stamp duties on deeds of declaration of uses and trusts, see *ante*, p. 624.

II. DEEDS OF DISCLAIMER AND RENUNCIATION BY EXECUTORS AND TRUSTEES.

If a person who has been appointed an executor, or a trustee, is determined not to accept the appointment, he should at once announce that intention, and carefully abstain from doing any acts which can possibly be construed to have been performed by him in either of the above-mentioned characters, which, if he were once to adopt, he would not afterwards be permitted to cast aside. His best and safest course, however, is at once to disclaim the office by a regular and formal deed of renunciation or disclaimer.

How disclaimer by a trustee should be effected.]—This, in the instance of a disclaimer by a trustee, should be effected by a deed, wherein the settlement, will, or other instrument appointing the trustee should be recited, as also that he has never acted in, and wholly declines the trusts, which trusts he should then formally renounce and disclaim: (see the form 3 Con. Prec., Part X., No. II., pp. 143, 144, 2nd edit.)

Where parties wish to disclaim both the offices of trustee and executor.]—Where the party wishes to disclaim both the characters of trustee and executor, he should take care to disclaim both those offices; for where a person is appointed both executor and trustee, his renunciation of the executorship will be no disclaimer of the trusteeship: (*Yates* v. *Compton*, 2 P. Wms. 308; *Denne* v. *Judge*, 11 East, 288.)

How instrument of renunciation should be penned.]—The proper way to pen an instrument for the last-mentioned purpose, will be to recite, first, the will appointing the renouncing party as trustee and executor; next, the death of the testator and probate of his will, and that such renouncing trustee and executor has refused to prove

the will, or to act in the trusts thereof; and then the party should formally renounce and disclaim all devises, bequests, trusts and powers given, devised, or bequeathed to him by such will: (see the form 1 Con. Prec., Part X., No. I., pp. 141, 142, 2nd edit.) If, in consequence of the renouncing executor refusing to act, the will has been proved by the other executors; or, in case of there being no other executor, administration with the will annexed has been taken out, those facts ought also to be recited.

Substitution and appointment of new trustees.]—During the continuance of a trust, it frequently becomes necessary to substitute a new trustee in the place of one who has died, or who from some cause or other is desirous of being discharged from the trusts, or has become incapable to act therein. Whenever this occurs, it must be ascertained whether the instrument creating the trust authorizes the substitution of a trustee under any of the above-mentioned circumstances, and if it does, the substitution should be made accordingly; but if the instrument contains no such power, then the substitution and appointment of a new trustee can only be effected through the medium of the Court of Chancery, which court is authorized to make an order appointing new trustees, either in substitution, or in addition to any existing trustee or trustees, whenever it shall appear expedient so to order: (13 & 14 Vict. c. 60, s. 32.)

Effect of the appointment of new trustees by the Court of Chancery.] — Trustees so appointed by the Court of Chancery have the same rights and powers conferred upon them, as he or they would have had if appointed in a decree in a suit duly instituted: (*ib.* s. 33.) And the court is also authorized, upon making the above-mentioned order, either by the same or any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who, upon the appointment, shall be the trustee or trustees for such estate as the court shall direct; and such order shall have the same effect as if the person or persons who, before such order, were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate: (sect. 34.)

Where the appointment is made in pursuance of a power limited by the instrument creating the trust.]—But where an appointment of a substituted trustee is made in pursuance of an ordinary power, limited by the instrument creating the

trust, although the appointment confers the character upon the new trustee, it is insufficient to clothe him with the trust estate. To effect this, an actual conveyance or assignment of the trust property must be made to him by the outgoing trustee and continuing trustees (if any), or the representatives of the last existing trustee, according to the particular nature and quality of the trust premises: (*Warburton* v. *Sandys*, 14 Sim. 622; *Bennett* v. *Burgis*, 5 Hare, 295.)

Points to be carefully attended to in making appointment.] —In making the appointment of a substituted trustee, care ought to be taken, not only to follow the precise terms of the power, but also to show in the expressions by which it is exercised, that such terms have been duly complied with; as, for example, if the consent in writing of some particular person is required, or if it is also required that the instrument of appointment is to be executed and attested in the presence of a certain number of witnesses, it should be stated in the first instance, that the appointment is made with such consent in writing; and in the other, that it is made by an instrument attested by the required number of witnesses.

Where a single instrument will suffice, and where two will become necessary.]—If entirely new trustees, or only a single trustee is appointed to fill the vacant office, or if the whole of the trust property consists of real estate, then one instrument will be sufficient to perfect the assurance, and the appointment of the new trustee, and conveyance or assignment of the trust estate may be both contained in the same deed. But if the new trustee is to have a joint estate vested in him with the continuing trustee, and the trust property, or any part of it, consists of chattels, whether real or personal, then a second instrument will be required to execute the joint estate. That is to say, the only effectual way in which this can be done is for the continuing trustees, and all persons in whom the trust property is vested, first to assign the same to a temporary trustee upon trust that the latter shall, by a deed then already prepared, reassign the trust premises to the continuing trustees and new trustee upon the trusts of the original settlement: (see the form 3 Con. Prec., Part X., No. III., clause 11, p. 149, 2nd edit.) And such assignment must be made accordingly: (see the form, *ib.* No. IV., 151.)

Cause of two instruments being requisite.]—The necessity for the two instruments arises from the circumstance that assignments of personal property, whether consisting of

chattels real or personal, are not within the operation of the Statute of Uses, so that a trustee cannot, as in the case of a freehold estate, be used as a conduit-pipe, through the medium of which parties may grant and take back a legal estate by the same instrument. But where the trust property consists of a freehold estate, then, by the continuing trustees or trustee and the retiring trustee conveying the same to a temporary trustee to uses, such estate may be limited to such temporary trustee and his heirs to the use of the continuing and new trustee and their heirs, by which means the whole legal fee will become effectually vested in such new trustee jointly with the continuing trustees without the necessity of any further assurance, and, in fact, as effectually to all intents and purposes as any modern mode of assurance is capable of accomplishing.

How instrument appointing new trustees and vesting trust estate should be penned.]—If the appointment of the new trustees, and conveyance and assignment of the trust estate, are both contained in the same instrument, that instrument ought to be an indenture in preference to a deed poll. The new trustee should execute the deed, and thereby bind himself by estoppel to an acceptance of the trusts, which neither his appointment, or even being named as a grantee in the conveyance of the trust estate, would afford conclusive evidence of.

How instrument appointing new trustee should be penned.] —The proper parties will be the donees of the power, who are to appoint the new trustee of the first part; the continuing trustees, and also the retiring trustee, if living, or the representatives of the last existing trustee, or any other persons in whom the legal estate is vested, of the second part; the trustee to serve the uses, or to be the temporary assignee of the personal estate, of the third part; and the continuing and new trustee of the fourth part. The settlement or will appointing the trustees should be then recited, and the power to appoint the new trustees should be clearly stated, setting out at the same time the terms, if any, which are prescribed for executing such power. After this, the cause of the office of trusteeship becoming vacant, as by death, desire to retire from office, incapacity or unwillingness to act any longer in trusts, and so forth, should be stated, according to the circumstances, as also the intention to appoint the new trustee to the vacant office. The appointment of the new trustee should then be made, which, as we

have just before noticed, should be made in strict accordanc with the terms of the power; and it should then be declared that the new trustees have consented to accept the trusts: (see the form 3 Con. Prec., Part X., No. III., clauses 1 to 5 inclusive, pp. 145, 148, 2nd edit.)

Conveyance and assignment of the trust estate.]—The conveyance or assignment of the trust estate must next follow. If real estate is to be conveyed, the conveyance must be made by the continuing trustees and the retiring trustee, if he be then living; but if the vacancy has occurred by his death, the concurrence of his heir would not only be unnecessary, but incorrect, where the trust estate was limited, as it ought to be, and in fact almost invariably is, to the trustees as joint tenants; because in that case, on the decease of any one of them, his estate would survive to his companions; but if, by any accident, the trustees were limited to take as tenants in common, then the concurrence of the heir of any deceased trustee would be requisite. The trust property must be conveyed to the trustee to uses, *To hold* to him, his heirs and assigns, *to the use* of the continuing and new trustee, their heirs and assigns, upon the trusts of the original settlement: (see the form 3 Con. Prec., Part X., No. III., clauses 6 and 7, pp. 148, 149, 2nd edit.)

Where the vacancy occurs by the retirement or death of a sole or only surviving trustee.]—If the vacancy occurs in consequence of the retirement of a sole or of an only surviving trustee, then he alone, if living, will be the proper conveying party; and if dead, his representatives, according to the nature of the property, must stand in his place. If it consists solely of real estate, his heir must convey; if of personal, his personal representatives must assign; and if it consists both of real and personal property, his heir must convey the freehold portions of such trust estate, and his personal representatives assign those portions which consist of personal property.

Where the trust property consists of personal estate.]—In an assignment of personal estate, if it be made to entirely new trustees, or in case no trustee is appointed, but the retiring trustee only assigns his interest in the trust property to a continuing trustee or trustees, then it will be sufficient to limit the assigned premises to such new trustees or continuing trustees. But if a new trustee is appointed to act conjointly with the continuing trustees, then, for the reasons

already given (*ante*, p. 633), the assignment must be made to a temporary trustee, To hold unto the latter, *upon trust* to assign the same trust estate and premises to the continuing and the new trustee, which must be carried into effect by a subsequent instrument: (see the form 2 Con. Prec., Part X., No. III., pp. 145, 150, 2nd edit.) This instrument may be either a deed poll or an indenture; but the former is generally adopted for that purpose. By this it will be proper to recite the accompanying deed by which the new trustees are appointed; after which, the temporary trustee should assign the trust property to the continuing, and the new trustee or trustees, so as to vest the same in them as joint tenants, which it is thereby declared they are to hold upon the same trusts as are declared by the original settlement: (see the form 3 Con. Prec., Part X., No. IV., pp. 151, 153, 2nd edit.)

Where the trust estate consists of stock.]—Where the trust estate consists of stock in the public funds, the stock should be transferred from the names of the old into the names of the new trustee or trustees; and a memorandum of acknowledgment by the new trustees that the stock has been duly transferred accordingly ought to be indorsed on the original deed of settlement: (see the form 3 Con. Prec., Part X., No. V., p. 155, 2nd edit.) A memorandum of this kind does not require a stamp.

CHAPTER VII.

APPOINTMENTS IN EXERCISE OF POWERS.

PREVIOUSLY to the preparation of any instrument for exercising a power of appointment, it will be necessary to examine the instrument creating the power, in order to ascertain the extent to which the donee is authorized to exercise it; and in penning the instrument of appointment, due care must be taken that the terms of the power are strictly complied with; for the liberal assistance which a court of equity has ever been ready to afford in the aid of a defective execution of powers, affords no excuse to the practitioner through whose neglect or carelessness such defects arise as to render this equitable assistance necessary, which can never be obtained without incurring some considerable expense.

As to the instrument by which the power is to be executed.]—If a power of appointment is limited to a party in general terms, the donee of such power will be thereby authorized to make an appointment by any instrument by which the property over which the power extends could have been disposed of to a third party; but if a particular instrument only is specified, then by that particular instrument only can the power be exercised. If, therefore, the power be to appoint by deed, it cannot be exercised by will, and so *vice versa*.

As to the mode in which the power is to be executed.]—No particular mode of execution is required by law for the execution of a power, and if the donor of the power imposes none, any instrument by which the appointment is authorized to be made and executed in the usual manner will be sufficient for the purposes; still it must be borne in mind, that although the law requires no particular solemnities, the

party creating the power may impose such terms as he thinks proper for carrying it into execution, provided they do not contravene any established rule of law or equity; hence a power may be required to be executed by a deed attested by any number of witnesses, or witnesses of a particular character, as privy councillors for instance; or it may be authorized to be exercised by a single notice in writing, without requiring the attestation of a single witness; but a power cannot now, although formerly the law was otherwise, be reserved to be executed by an unattested will, or any will not regularly executed and attested, because formerly the law did not, as it does now, require that every appointment authorized to be made by will must be made by a will valid in all respects as such; and that if so valid, an appointment thus made will be effectual, notwithstanding any other terms the donor may have prescribed are not attended to; as where he directs the will to be attested by three witnesses instead of two, or witnesses of a particular description, because to hold otherwise would be in direct contravention of a rule of law established under the express words of an act of Parliament: (stat. 1 Vict. c. 26, s. 10.)

Capacity of donee of power.]—All persons of full age, not labouring under the disabilities of infancy and unsound mind, may exercise a power of appointment; hence, it may be limited to be exercised by a married woman, in the same manner as if she were sole; and whatever doctrine may formerly have prevailed with respect to the validity of such a power over the legal estate in real property, when limited to a married woman (*Goodhill* v. *Bingham*, 1 Bos. & Pull. 192), it is now clearly established that such a power is perfectly valid and effectual, and may be exercised by a married woman, whether she be covert or sole, and without any reference to her husband's consent or otherwise: (*Kenyon* v. *Sutton*, 2 Ves. 601; *Harmood* v. *Oglander*, 8 Ves. 116; *Maundrell* v. *Maundrell*, 7 Ves. 567.)

Proper instrument to be adopted for exercising a power of appointment.]—Where a power is limited to be exercised by a deed or instrument in writing, a deed poll is usually adopted in preference to an indenture. There is one case, however, where an indenture is a better instrument for this purpose than a deed poll, which is where a party makes an apportionment of property amongst children or other objects in exercise of a power of distributing the shares, by which means all who execute such indenture will be estopped from

disputing its validity at any future period; which estoppel could not of course have been raised upon a deed poll, which has that operation only upon the party who actually executes it, and does not affect the parties taking under it.

As to illusory appointments.]—Still this estoppel was far more important formerly than at the present day; because, previously to the passing of the act 1 Will. 4, c. 46, questions were continually arising as to whether, in case of an unequal apportionment, the appointment of the smaller shares was not merely illusory, which it was sometimes a puzzling task to determine, from the difficulty of defining the exact limit of amount at which the appointment ceased to be illusory, and began to become substantial: (*Butcher* v. *Butcher*, 9 Ves. 393.) At law, however, the appointment of any share, however small, as one shilling, for instance, was considered a substantial, and not an illusory appointment (*Gibson* v. *Kinvern*, 1 Vern. 67; *Morgan* v. *Surman*, 1 Taunt. 289); and by the statute 1 Will. 4, c. 46, the same rule is prescribed to courts of equity with respect to all appointments made subsequently to the passing of that act, and by which it is enacted, that no appointment which from and after the passing of that act shall be made in the exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed, or left unappointed, to devolve upon any one or more of the objects of such power, but that every such appointment shall be valid and effectual in equity, as well as at law, notwithstanding any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share in the property subjected to such power: (sect. 1.)

Act not to affect any provision in instrument creating power that declares the amount of the share.]—The second section of the above-mentioned act provides, however, that nothing therein contained shall affect any provision in any deed or other instrument creating any such power, which shall declare the amount of the share. And the third section provides that the act shall not give any other force to any appointment than such appointment would have had, if a substantial share of the property affected by the power had been thereby appointed, or left unappointed to devolve upon any object of such power.

When an indenture is a preferable instrument to a deed poll.]—In certain other instances, however, besides the one we have just alluded to, an indenture is a preferable instrument to a deed poll. Thus, for example, where an appointment is to be made by a husband for the purpose of raising a jointure in favour of his wife, in pursuance of a power to that effect limited either by will or by deed, an indenture will be a more convenient instrument than a deed poll, particularly where a term of years is authorized to be raised and vested in trustees as a security for enforcing the due payment of such jointures. An indenture has also an additional advantage wherever trustees are to act in carrying out any of the objects of the appointment, particularly where such trusts do not take effect immediately; as in the instance above mentioned, of a jointure made for the appointor's wife, but which will not take effect until after his death; or trusts appointed to take effect after the death of parties then living, or at some future period; in which case, if the trustees are parties to and execute the deed, there will always be certain proof of their having accepted the trusts, which it might otherwise be difficult to prove if they were appointed by a deed poll, or even by an indenture, unless they executed the latter instrument.

Indenture will always be necessary where the instrument is intended to embrace anything beyond the simple act of appointment.]—And whenever the instrument is intended to embrace any other objects than the mere appointment, or is intended to be binding on any other parties than the appointor, an indenture will always be the proper instrument to adopt. Thus, where an appointment is made for the settling property under a marriage settlement, to which the intended husband and wife ought always to be named as parties, such an assurance could not be carried out properly by a deed poll. And whenever the appointee is to give or relinquish any benefit, or to perform any acts, as a consideration for the appointment being made in his favour, the appointment should always be made by indenture, to which the appointee should be made a concurring party.

When a deed poll will be the preferable instrument.]—But whenever a simple and absolute appointment is made in favour of one or more appointees, a deed poll is the best instrument, and is the one, therefore, that is usually adopted under those circumstances, whether the subject-matter of the appointment consists of real or of personal estate.

In all appointments the instrument creating the power should be recited.]—By whatever kind of instrument the appointment is made, it should recite the instrument creating the power, the terms of the power itself, by what modes of assurance it is to be exercised, and the particular forms and ceremonies (if any be prescribed) by which such power is to be executed.

Limitations antecedent to the power should be recited.]—If there are any antecedent limitations to take effect prior to the estates or interests to take effect under the appointment, it will be proper to recite the nature of such prior limitations; as, where the limitations under the powers are to take effect after the determination of a preceding life estate, or some other limited or contingent estate or interest; but it will be unnecessary to set out any of the ulterior limitations to take effect in default of appointment. It will be sufficient, in the latter instance, to state simply, that in default of appointment the premises were limited to certain other uses (or trusts, as the case may be) in the now reciting indenture (or will or other instrument) limited and declared: (see the form 3 Con. Prec., Part IX., No. II., clause 1, p. 123, 2nd edit.) Or the limitations may be very shortly referred to; as, for example, where a tenant for life has a power of jointuring limited to him under limitations in strict settlement, in which case it will be sufficient to recite that by a certain instrument, setting out the date and nature of such instrument, the settled property was limited to the appointor for life, "*with divers limitations over after his decease*," but with a proviso enabling him to make a jointure upon any woman he might marry: (see the form 3 Con. Prec., Part IX., No. I., clause 2, p. 116, 2nd edit.)

Usual practice to recite desire to exercise power.]—It is also a common practice to recite the desire to exercise the power of appointment, and at the same time to name the particular objects in favour of whom the appointment is to be made; to which is sometimes added the particular manner in which such power is intended to be exercised; as, for instance, in the case of a husband intending to exercise a power of jointuring in favour of his wife by creating a rent-charge to arise out of real estate, and limiting a term of years as a further security for the payment of the same, when it is a common practice to recite the intention to create such rent-charge, and to limit such term accordingly: (see the form 3 Con. Prec., Part IX., No. I., clause 3, p. 117, 2nd edit.)

How clause of appointment should be penned.]—In the clause executing the power, it will always be proper to state that the appointment is made in exercise of the power limited by the instrument creating it, setting out at the same time the particular kind of instrument, as deed, will, or other instrument, as the case may be; and in the actual appointment, it will be correct to mention the name of the instrument by which it is made, using the same terms as are applied to it in the instrument creating the power; and if it is to be executed and attested in any particular manner, as by two, three, or any other specified number of witnesses, it will be correct to state the appointment to have been made and executed and attested accordingly: (see the form 3 Con. Prec., Part IX., No. I., p. 117, *in notis*, 2nd edit.) This is done for the purpose of showing upon the face of the instrument of appointment that all the terms of the power have been strictly complied with; but such statements are not essential to the validity of the appointment, for if the terms of the power are in reality complied with, it will be sufficient, whether it be so stated, or whether the instrument of appointment is altogether silent upon the subject.

Appointments for raising portions for younger children.]—Where an appointment is made in pursuance of a power to raise portions for younger children, the proper way to pen the instrument is first to recite the instrument creating the power in the way we have already pointed out, and therein to set out clearly the particular clause by which the power is limited (see the form 3 Con. Prec., Part IX., No. IV., clause 1, p. 126, 2nd edit.); next, to recite how many children there are who are at present objects of the power, and which of such children it is intended to make the appointment in favour of. The appointment of the portion or portions, as the case may be, is then made, and the trustees under the instrument creating the power are authorized to levy and raise the same in accordance with the powers and in pursuance of the trusts thereof, and by virtue of the appointment made by the present instrument. To these clauses is usually added a proviso that the appointment thereby made is not to prevent any further appointment to appointee, or to preclude him from taking his share in the residue: (see the form 3 Con. Prec., Part IX., No. IV., pp. 126, 127, 2nd edit.)

Appointment of a jointure.]—Where an appointment is made to secure a jointure to a wife, after reciting the instru-

ment by which the power is created, and that the appointor is desirous of making the appointment, he should make the appointment accordingly, and if the power warrants the insertion of powers of distress and entry, those powers should also be limited and appointed; and if the power authorizes the limiting of a term of years for securing the jointure, the term should be limited to trustees for that purpose: (see the form 3 Con. Prec., Part IX., No. I., pp. 116, 121, 2nd edit.)

Where present appointment is not to prevent future appointment.]—Whenever, by the present appointment, the power of jointuring is not exercised to its fullest extent, it will be advisable to add a clause authorizing the husband to make a future appointment upon the same terms, and under the same restrictions, as are authorized by the terms of the power: (see the form 1 Con. Prec., Part IX., No. I., clause A., *in notis*, p. 121, 2nd edit.)

Hotchpot clause.]—Where the appointment does not embrace all the objects of the power, it is often found expedient to insert a hotchpot clause, by which it is provided that the appointment then made shall not prevent the appointor from making any future appointment in favour of the present appointee or appointees; but nevertheless, that the latter are not to be entitled under the present appointment to any greater shares than they would otherwise be entitled to if such appointment had not been made: (see the form 3 Con. Prec., Part IX., No. VIII., clause 5, p. 139, 2nd edit.)

Power of revocation.]—If a power of revocation is to be reserved, a clause to that effect should be inserted at the end of the instrument of appointment. By this clause the appointor should be authorized to revoke all or any part of the limitations or appointments thereby made, so and in such manner as that the property to which such revocation shall extend may stand limited in the same manner, and subject to the same powers of appointment, as if the present appointment had not been made: (see the form 3 Con. Prec., Part IX., No. III., *in notis*, p. 125, 2nd edit.)

CHAPTER VIII.

PARTITION DEEDS BETWEEN JOINT TENANTS, TENANTS IN COMMON, AND COPARCENERS.

I. In ordinary cases.

1. Preliminary observations.
2. Practical directions for penning partition deeds.

1. *Preliminary Observations.*

The practice with respect to partition between joint tenants in common, and coparceners, may be arranged under two heads. First, the partition or allotment of the property amongst the several parties; second, the assurances by which such partition of allotment is to be carried into effect. The second is a comparatively easy task to an experienced practitioner; for when the parties are once agreed as to the allotted shares which each is to take, there is little or no difficulty in framing the necessary assurances for the purpose; but with respect to the division, disputes and difficulties constantly arise as to the different parts which each desires to have, and the relative proportions into which the property is subdivided. This often leads to proceedings in Chancery to settle the rights of the parties, a very expensive course of proceeding, and one that ought, if possible, to be avoided. The best and fairest course, where the parties cannot agree amongst themselves as to the allotments, is to have the whole property surveyed, valued, and allotted by

competent and disinterested persons, and then for the several parties to draw lots as to the choice.

Practice to give a sum for equality of partition when equal allotments cannot be made.]—It often, however, happens that, with every disposition to make an equal allotment between all the parties, from the local situation of the property, or other circumstances, this cannot be accomplished. In cases of this kind, it is the practice for the parties taking the shares of smallest value to receive a sum of money by way of compensation and for equality of partition.

As to partition of freehold estates.]—Where partition is made of freehold estates, it may be done by mutual grants and releases, by which all the parties convey their respective shares in the allotted part to the party who is to take the same in severalty, who in his turn also concurs in conveying his undivided share in the other portions of the allotted property; or it may be effected by all the parties making partition conveying to a releasee to uses, and having their respective allotments limited to them through his seisin, which should always be done when it is designed to limit any of the allotted portions to uses to bar dower. When the first plan is adopted, the usual practice is to employ as many deeds as there are allotted shares, each party having his divided portion allotted to him by a distinct instrument; but by the second plan, one instrument only is generally adopted, as all the allotments may be made, and the uses declared, out of the seisin limited to the releasee to uses: (see the latter form, 1 Con. Prec., Part VIII., No. I., pp. 78, 79.)

As to leasehold and copyhold estates.]—Leasehold and copyhold estates not being within the Statute of Uses, a partition cannot be effected by an assurance operating under that statute. In the case of leaseholds, therefore, all the parties making partition but the one to whom the allotment is to be made concur in assigning the premises to the latter, to hold to him during the residue of the term, subject to the rents and covenants of the lease. In the case of copyholds, instead of making an assignment, the best mode seems for the same parties to enter into a covenant to surrender their other undivided shares to the other party, to the intent that he may be admitted tenant to the divided premises, to hold to him in severalty, &c.: (see the form 3 Con. Prec., Part VIII., No. V., clause 9, p. 104, 2nd edit.)

2. *Practical Directions for penning Partition Deeds.*

Parties.]—In setting out the parties at the commencement of the deed, it will be correct to name each granting party as of a distinct part, as of the first, second, and third parts, and not associate them altogether as parties of the one part, even in cases where they all concur in conveying to the same grantee. If any of the conveying parties are married women, their husbands must be made concurring parties, and the deed must be duly acknowledged by their respective wives, in pursuance of the Fines and Recovery Substitution Act, 3 & 4 Will. 4, c. 74: (see the form 3 Con. Prec., No. III., clause 1, p. 86, 2nd edit.) If any husbands are entitled as tenants by the curtesy, they, as also the heir of the deceased through whom they claim, must also be conveying parties. If the partition is made through the medium of a releasee to uses, according to the plan we have just before suggested, he must of course be named as a party; and where an allotted share is to be limited to uses to bar dower, it will be necessary to make the trustee for that purpose a party; but where there is a releasee to uses, he may, and in fact will, be the proper person to fill the office of dower trustee, as well as that of releasee to uses.

Recitals.]—In partition deeds, it is usual to recite the agreement to make partition, and also to show the nature of the estate of the several parties in the allotted premises. Hence, if made by coheiresses, it should be shown by the recitals that they take by descent, because coparceners are capable of taking in no other manner (Gilb. Ten. 72, 73; Shep. Touch. 14; 5 Cru. Dig. 118; 2 Bla. Com. 187); whereas joint tenants (Lit. 63, c. 3; 2 Bla. Com. 179), and tenants in common (2 Bla. Com. 191), must always take as purchasers, and therefore the mode in which the latter acquire their estates and interests in the property ought also to be shown by a recital of the deed, will, or other instrument by which they were created. If a sum of money is to be paid for equality of partition, that circumstance ought also to be recited: (see the form 3 Con. Prec., Part VIII., No. III., clause 4, p. 87, 2nd edit.)

Testatum.]—Where no money is either paid or received by way of equality of partition, the deed usually states that for a nominal pecuniary consideration, as *5s.*, or the like, paid by the trustee to uses to the parties making the partition, the latter, according to their respective undivided shares,

estates, and interests in the premises, grant, release, convey and confirm unto the trustee and his heirs the whole of the parcels, which are then described and set out in the usual manner, and accompanied with the usual general words and all-estate clause: (see the form 3 Con. Prec., Part VIII., No. I., clause 3, p. 79, 2nd edit.)

Where a sum of money is paid by way of equality of partition.]—If a sum of money is paid by way of equality of partition, such payment and acknowledgment of the receipt should be set out in the same manner as in an ordinary purchase or mortgage deed: (see the form 3 Con. Prec., Part VIII., No. IV., clause 4, p. 92, 2nd edit.) Still this, although the correct and proper course, is not so absolutely necessary as it would be in the case of an ordinary purchase deed, where, unless the consideration money is truly expressed, both vendor and purchaser are subjected to heavy penalties (see *ante*, p. 264); for it has been recently determined (*Hennick* v. *Hennick*, 20 L. T. Rep. 125) that the Stamp Acts (55 Geo. 3, c. 184; 13 & 14 Vict. c. 97, s. 22), which require the full purchase or consideration money to be truly stated in the deed, does not apply to a case of partition. And where a money bond was given to pay the true consideration given for equality of partition, it was held, that even if the deed were not properly stamped, and did not express the true consideration, the bond was not therefore void: (*ib.*)

Operative words.]—The same operative words are used as in an ordinary deed of conveyance. If the conveyance of the allotted part is direct to the party, the other parties convey their undivided shares therein to him (see the forms 3 Con. Prec., Part VIII., No. II., clauses 4 and 5, p. 84, 2nd edit.); but if the partition is to be made through a releasee to uses, then all the parties making partition must convey to such releasee.

Parcels.]—The best and most effectual mode of describing the parcels is to set them out in as many schedules as there are to be allotments, the allotment of each party being set out in each schedule; and for the purpose of still better identifying the property, to have a map or plan of the premises delineated either on the back of one of the skins, or indorsed in the margin of the deed, the part allotted to each being distinguished from the rest by some particular colour.

Habendum clause and declaration of uses.]—If the conveyance is direct to the party, the allotment should be made to him accordingly by the habendum clause of the partition deed; but if the partition is through the medium of a releasee to uses, then the whole of the premises must be limited to the trustee and his heirs, to the uses thereinafter to be declared, and then the shares should be allotted accordingly; as, for example, "As to, for, and concerning all and singular the hereditaments and premises specified and set forth in the first schedule hereunto annexed, and which are coloured green in the map or plan indorsed on the second skin of these presents, to the use of the said A. his or her heirs and assigns for ever;" and so continue in like manner declaring the uses of all the other allotments: (see the form 3 Con. Prec., Part VIII., No. I., clauses 4 to 7 inclusive, pp. 79, 80, 2nd edit.)

Declaration of uses in favour of married coparcener.]—Where the partition is made by coparceners, some of whom are married women, the uses declared may be limited to their separate use, or they may have a power of appointment annexed to the limitation of their estate (see the form 3 Con. Prec., Part VIII., No. III., clause 7, p. 89, 2nd edit.); or, in fact, any uses or trusts may be limited in their favour, or for the benefit of such persons as they may choose to appoint.

Dower uses.]—In partitions by tenants in common or joint tenants, where any of the latter are married prior to the year 1834, it will be necessary to have the allotted shares limited to uses to bar dower, unless, which is seldom the case, it is intended that the wife's right of dower shall attach upon the property. If the partition is made according to the plan now under consideration, the trustee to uses will be the proper party to make the dower trustee. The allotted premises should be limited to the trustee and his heirs to such uses as the party taking such allotment shall appoint; and in default of such appointment, to the use of the party for the term of his life without impeachment of waste; and after the determination of that estate, by any means, in his lifetime, to the use of the trustee, his executors or administrators, during the life of and in trust for the said party and her assigns, with the ultimate limitation to the use of the said party, her heirs and assigns for ever.

Where partition is made by joint tenants, it will be correct

to omit the habendum clause, unless where the allotted premises are intended to be limited to uses to bar dower.]—Where a partition is made between two or more joint tenants, and the divided share is intended to be limited simply in fee, the correct course will be to omit the habendum clause altogether, and for the one joint tenant simply to release his share to his companion: (see the form 1 Con. Prec., Part II., No. IX., clause 4, p. 72, 2nd edit.) But if dower uses are required, then both joint tenants should convey to a releasee to uses and the dower uses declared to arise out of his seisin, in the manner we have just before pointed out: (see the form 1 Con. Prec., Part II., clauses A. and B., *in notis*, p. 73, 2nd edit.)

Covenants.]—In partition deeds, it is the usual practice for the parties making division to enter into the same qualified covenants for title, quiet enjoyment, freedom from incumbrances, and for further assurance, as are entered into by vendors to purchasers under ordinary circumstances. These covenants, where the partition is made through the medium of a conveyance to a trustee to uses, in order that they may run properly with the land, should be made to the trustee to uses: (as to which see *ante*, pp. 234, 225.) If any of the conveying parties are married women, their husbands must covenant for them, the same as in the case of a conveyance to a purchaser: (see the form 3 Con. Prec., Part VIII., No. III., clause 9, p. 89, 2nd edit.)

As to warranty clause.]—It was formerly a common practice to insert a clause to prevent the consequences of a warranty in partition deeds, but this, it seems, was an unnecessary precaution whenever the usual qualified covenants for title were inserted; and notwithstanding an opinion seems at one time to have prevailed that the words "give or grant" would raise an implied warranty, it has been long settled that, even if they ever had this operation, those terms would be restricted by the qualified terms expressed in the usual covenants for title entered into by vendors; added to which, the act 8 & 9 Vict. c. 108, expressly enacts that no implied warranty shall arise either from the words "give or grant." Still, in spite of all these decisions and enactments, some cautious practitioners still insert a clause for the purpose of negativing implied warranty: (see the form 3 Con. Prec., Part VIII., No. I., clause A., *in notis*, p. 82, 2nd edit.)

Clause of re-entry in case of eviction invalid as tending to

a perpetuity.]—A clause has also been sometimes inserted, by which it has been provided that in case either of the parties making partition shall be evicted from their allotted share, the petition shall be void, and the party evicted have a right of re-entry on the other shares; but it seems that such a clause is void, as having a tendency to perpetuity: (see Sug. Gilb. Uses, 179.)

Partition sometimes carried out through the medium of a conveyance to a mutual trustee for that purpose.]—It is sometimes arranged that the several parties desirous of making partition convey to a mutual trustee, who is to divide the premises and allot the same between the several parties. To accomplish this object, the premises are conveyed to the trustee in precisely the same manner as in the form we have just before pointed out, to hold to the uses thereinafter limited. It is then declared that the trustee shall divide the premises into as many equal allotments as there are parties entitled to share them, which partition, when so made, shall not afterwards be impeached on any account or pretence whatsoever: (see the form 3 Con. Prec., Part VIII., No. VI., pp. 109, 111, 2nd edit.)

Allotment how to be made.]—The actual allotment amongst the parties is made by a separate instrument. It may be done either by deed poll or by indenture, but the latter instrument seems best adapted to the purpose. By this, after setting out the date and names of the parties, the instrument by which the estate in coparceny, joint tenancy, or in common was created is first recited, and then the deed creating the power to make partition, and that the trustee, in exercise of the power, has made partition. The trustee then proceeds to make his allotment, by appointing the several parcels in the same manner as the several uses are respectively declared in favour of the different parties, in the form we have just before suggested (*ante*, p. 648): (see the form 3 Con. Prec., Part VIII., No. VII., pp. 112, 114, 2nd edit.)

Where partition is made between tenants in tail.]—Where partition is made between tenants in tail, a disentailing assurance will be necessary. This may be contained either in the partition deed, or by a distinct assurance: (see the form of a disentailing assurance and partition deed, 3 Con. Prec., Part VIII., No. III., pp. 86, 90, 2nd edit.)

As to leaseholds.]—Where the partition is of leasehold

property, the instrument creating the tenancy in common should be recited, and also the agreement to make partition. The recitals of the creation and mesne assignments of the term, if recited at all, are more neatly done, by placing them at the end of the description of the parcels, in the manner pointed out in a preceding part of the present work (*ante*, p. 208), than by inserting them amongst the recitals preceding the testatum clause; but such recitals ought to be concisely penned, according to the plan we have previously suggested: (*ib.*) The several assigning parties should then assign the undivided shares in the allotment to the other party, for the residue of the term, subject to the rents and covenants of the original lease. The assigning parties enter into the usual qualified covenants with the assignee, that the lease is a valid and subsisting lease; that the assigning parties have good right to assign; that the reserved rents have been duly paid, and all the covenants performed; for quiet enjoyment and freedom from incumbrances, and for further assurance, in exactly the same manner as in the case of an ordinary purchase deed.

Several partitions may be contained in the same deed.]— Several partitions may, if required, be contained in the same deed; and if the parties making partition are satisfied with having a mere trust or equitable estate allotted to them, the partition may be effected in as concise a form as in the case of freeholds. This is done by assigning all the undivided shares to a trustee or trustees, and declaring trusts of the several allotments in favour of the several parties, on the same plan as uses are before directed to be limited in partitions of freehold estates. Should any of the parties afterwards desire to have the legal estate assigned to them, it may be done by a short deed, in the same way we have before pointed out; when an assignment of personal property is made for the purpose of vesting it in a new trustee jointly with a trustee or trustees already existing: (see *ante*, p. 635.) But if the legal estates are to be conferred in the allotments, each allotment should be made separately, by all the other parties assigning their undivided shares to the party in whose favour such allotment is to be made, to do which effectually will require as many testatum and habendum clauses, as well as distinct covenants for title, as there are allotted shares; so that, whenever a division is made between more than two or three parties, it will always be advisable to make each allotment by a distinct instrument.

Where an apportionment of rent is required in respect of the several allotments.]—When any of the several allotments are held under the same lease, the several parties to whom they are assigned to hold in severalty should enter into mutual covenants with each other, for payment of the rent and performance of the covenants in respect of the assigned premises, with cross powers of distress: (see the form 3 Con. Prec., Part VIII., No. IV., clauses 14 and 15, pp. 97, 98, 2nd edit.) In cases of the latter kind, also, the party to whom the custody of the original lease and other documents of title are delivered should enter into a covenant with the other parties for their production: (see the form 3 Con. Prec., Part VIII., No. IV., clause 16, p. 99, 2nd edit.)

Partition of freehold, leasehold, and copyhold estates may all be effected by the same deed.]—A partition of freehold, leasehold, and copyhold estates may be all contained in the same deed. To effect this, the proper parties will be those making the partition and a releasee to uses. The creation of the estate of which partition is to be made should be recited, and then the agreement to make partition. The freehold portion of the premises should then be conveyed to the releasee to uses, and the uses declared to arise out of his seisin, in the manner we have just before directed (*ante*, p. 645); the leasehold premises should be assigned to the several parties to whom they are intended to be allotted, in the same way as if the deed embraced that description of property only; and with respect to the copyholds, the several parties should covenant to surrender those premises to the use of the party to whom they are to be allotted, in the same manner as if copyholds alone formed the subject-matter of the partition: (see the form 3 Con. Prec., Part VIII., No. V., clauses 1 to 11 inclusive, pp. 101 to 105, 2nd edit.)

II. Partition made under the Directions of the Court of Chancery.

A partition may be compelled either by a writ of partition or by a bill in Chancery; but as writs of partition have been long superseded by partition bill in Chancery, we shall confine our sole consideration to the latter course of proceeding. By this a bill is filed to obtain the judgment of the court as to the rights of the parties; the several proportions they take in the property of which the partition is sought; and to procure a division of such proportions

accordingly; to effect which the court will issue a commission to persons who proceed to make a partition without the intervention of a jury; and upon the return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances and allotments made to the several parties.

Court of Chancery formerly no jurisdiction to decree partition of copyholds.]—The Court of Chancery had formerly no jurisdiction to decree a partition of copyholds, or of customary freeholds. But now, by statute 4 & 5 Vict. c. 25, any court of equity in any suit to be thereafter instituted therein for the partition of lands of copyhold or customary tenure, is empowered to make the like decree for ascertaining the rights of the respective parties to the suit in such lands, and for the issue of a commission for the partition of the same lands, and the allotment in severalty of the respective shares therein, as according to the practice of such court may now be made with respect to lands of freehold tenure: (sect. 85.)

Essentials to support a bill for partition.]—To support a bill of this kind, the applicant must show to the court a clear legal title (*Miller* v. *Warmington*, 1 Jac. & Walk. 493), otherwise the court may refuse the partition; and if there is a material omission in the proof of title, the bill will be dismissed with costs: (*Jope* v. *Morshead*, 6 Beav. 213.) But, generally speaking, where there is only a small failure in the proof of title, or when the shares of the party are alone doubtful, the court will either grant an inquiry, or direct an issue: (*Godfrey* v. *Littel*, 2 R. & M. 630.)

Suit, how conducted.]—The suit is carried on in the usual manner up to the decree, which either declares the rights and interests of the parties, or directs a reference to chambers for that purpose; in which latter case, as soon as they are ascertained, the cause is heard on further considerations, and a partition decreed: (Ayck. 207, 5th edit.) The decree directs a partition, and a commission to issue, by which commissioners are empowered to make partition, and for that purpose to examine witnesses.

Commissioners, how selected and appointed.]—Each party who appears by a separate solicitor is entitled to name four persons as commissioners, and they join and strike commissioners' names in the same way as on a commission to

examine witnesses abroad (2 Dan. Pract. 904, 2nd edit.), except that each of the defendants joins and strikes names with every other set of defendants, as well as with the plaintiff: (Smith's Pract. 620, 3rd edit.; 2 Dan. Pract. 109, 2nd edit.) But with a view of saving unnecessary expense, in this very expensive course of proceeding, it has become the usual practice for the parties to agree upon two persons to act as commissioners, who are generally either surveyors, engineers, or other scientific persons, according to the nature of the property to be divided: (2 Smith Pract. 620, 2nd edit.; Dan. Pract. 1091, 2nd edit; see form of commission, 2 Ayck. Pract.)

Return of commission.]—It is to be be observed, that although the return of the commission is directed to be "*without delay*," the commissioners are not limited, as in a commission to examine witnesses, to execute it before the end of the term following to that in which it is sealed: (1 Smith's Pract. 621, 3rd edit.; 2 Dan. Pract. 1092, 2nd edit.) It differs likewise from a commission to examine witnesses, that it may be executed in or within twenty miles of London: (*ib.*) It is also an open and not a closed commission, and the proceedings under it are open and not secret, nor is any oath of secrecy required to be taken by the commissioners, or those employed under them: (Seton on Decrees, 191.) The commission, when prepared, must be taken, together with the decree or order and a precipe, to the clerk of records and writs, by whom it will be sealed; the fee for which will be 1*l.*, payable by means of a stamp: (6 Order, 25th October, 1852.)

Parties or their solicitors ought to attend at the execution of the commission.]—The parties or their solicitors ought to attend at the execution of the commission, and then and there to produce their deeds, and such other evidence as may afford the commissioners the best information upon the subject; and such parties or their solicitors may, if necessary, cross examine the witnesses, and take every step necessary to discover the truth, and enable the commissioners to make a proper return: (Seton's Decrees, 191, 1st edit.; 1 Ayck. Pract. 208, 5th edit.) The commissioners should administer the questions to the witnesses, but they are not personally bound to take down the depositions in writing, which may be done by their clerks, by their own direction in point of language. If any dispute arises upon the evidence, the commissioners must agree amongst themselves upon the

words of the deposition, which should be then read over to the witness, and be signed by him before his dismissal: (*ib.*) When taken and signed, the depositions must be fairly engrossed upon parchment, in the same manner as depositions taken under a commission to examine witnesses (2 Dan. Pract. 1094, 2nd edit.), and be returned together with the commission: (*ib.*)

Commissioners are to allot the property, and return commission to be filed with clerk of records.]—As soon as the commissioners have apportioned and divided the property, they should proceed to allot the shares to the several parties, and then make their return, detailing the nature of their proceedings, which is in the nature of a certificate engrossed on parchment, and signed by the commissioners. This commission and return, with the interrogatories and depositions annexed, are then sealed by the commissioners, or any two or more of them, and are afterwards filed by the clerk of records and writs: (1 Ayck. 209, 5th edit.)

Every part of the estate need not be divided.]—In making a partition, it is not necessary that every part of the estate should be divided; it will be sufficient if each party have a proper share of the whole: (*Earl of Clarendon* v. *Hornby*, 1 P. Wms. 446.) If, therefore, there be three houses of different values to be divided amongst three, it will not be right to divide each house, for that would be to spoil every house; but some recompence should be made, either by a sum of money, or rent, for equality of partition to those who have houses of less value: (*ib.*)

Allotment of shares.]—Having apportioned and allotted the property, the commissioners should proceed to set apart and allot the shares to the parties. This they should do, when it can be accomplished, by lot, for which purpose they should call in some indifferent person, and require that person to draw lots for the shares of each party: (Seton on Decrees, 197.) But this course of making the choice of shares by lot should not be adopted where it cannot be done with fairness, and with due regard to the situation of the parties and the shares. In such cases it will be the duty of the commissioners to assign the shares to those parties to whom they would be of most value (independently of their value in the market), with reference to their respective situations in relation to the value of the property before the partition took place: (*Story* v. *Johnson*, 1 You. & Coll. 538.)

Separate certificate where commissioners cannot agree.]—If the commissioners cannot agree in the apportionment, they ought to make separate returns; but the consequence of such separate returns will be, that if the commissioners are equally divided, both will be quashed: (*Watson* v. *Duke of Northumberland*, 11 Ves. 153.)

How order for conveyance is obtained.]—After the commission is returned, and filed, the party who issued the commission moves to confirm the return by orders *nisi* and absolute, and the cause is set down for hearing on the certificate, and brought on in the usual way, and an order is then made for a conveyance of the estates as allotted according to the certificate of the commissioners: 1 Ayck. 209, 5th edit.)

How conveyance should be penned.]—In a partition deed under a decree of the Court of Chancery, the parties are described, and the creation of the estate of which partition is to be made recited, in the same way as in the partition deed under ordinary circumstances; after this the proceedings in Chancery are recited, wherein is set out the bill of the plaintiff or plaintiffs, and answer of the defendant or defendants; the decree or order to make partition; the commission for partition; the commissioners' allotment and certificate, and the order for the conveyance according to the allotments certified by the commissioners, and that the parties are desirous of perfecting the partition, and of limiting their allotted shares to the uses thereafter declared. It is then witnessed, that in obedience to the order of the Court of Chancery, and for the purpose of perfecting the partition, and to the intent that the several hereditaments allotted by the recited certificate of partition may be hereafter held in severalty, and setting out the sums of money (if any) that may be paid by way of equality of partition, the allotted premises are conveyed and assured in precisely the same manner, and the same qualified covenants for title entered into between the several parties, as in the case of an ordinary partition deed between the same parties.

Costs.]—With respect to the costs of a partition, the general rule is not to give costs on either side prior to the commission; that the costs of issuing, executing and confirming the commission, and of making out the title of the several parts of the estate, be paid by the parties in proportion to the value of their respective interests, and no costs of the sub-

sequent proceedings: (*Agar* v. *Fairfax*, 17 Ves. 548; and see also, *Calmady* v. *Calmady*, 2 Ves. 568.)

Rule with regard to title deeds and writings.] — With respect to the title deeds, &c. relating to the estates divided, which are in the possession of the parties, it generally forms part of the decree directing the partition, that after the partition such of them as shall relate to such part of the premises as shall be allotted to any of the parties alone shall be delivered to such parties; and as to those which concern any parts of the premises which shall be allotted to any or either of the parties jointly with others, the order generally is, that, as to such deeds, the parties are to be at liberty to apply to the court for directions, as they shall be advised; in which case it seems the court will hold the party entitled to the estate of the greatest value to be entitled to the custody of the deeds upon entering into a covenant to produce them, and allow copies to be taken of them when required: (Seton on Decrees, 186; 2 Dan. Pract. 1101, 2nd edit,)

CHAPTER IX.

PARTNERSHIP DEEDS.

I. Preliminary Observations.

Partnership deeds, like marriage settlements, are sometimes preceded by articles containing the general heads of the terms of the partnership, which are afterwards intended to be set out more fully in the partnership deed. In penning the articles, the terms upon which the partnership is to be carried on should be stated in a clear and concise manner; nothing ought to be omitted which the partnership deed is intended to embrace; and every expression which can possibly bear an equivocal construction ought most studiously to be avoided.

Usual terms contained in a partnership deed.]—The usual terms of a partnership deed consist of the agreement to enter

into partnership; the period for which such partnership is to be carried on; the style of the firm, nature of the business, and the place or places at which it is to be transacted; the capital employed, and the proportions in which it is to be advanced; how the profits and losses are to be shared and borne between the parties; the mode in which the business is to be conducted; allowances for private expenses; how the partners are to conduct themselves in the management of the concern; how the accounts are to be kept and adjusted; how the partnership is to be dissolved; the grounds on which any partner may be expelled from the partnership; and the general winding up and adjustment of the accounts upon the determination of the partnership.

Instruments containing terms of partnership.]—The mere articles which contain the heads of minutes that are intended to be afterwards reduced into proper technical form, are usually entered into by an agreement under hand only, upon a common agreement stamp; but the instrument which contains the formal concluded terms of the partnership, should be a deed under the hands and seals of all the parties, and duly stamped accordingly with a common deed stamp: (see *ante*, p. 625.)

II. Practical Directions for Preparing a Partnership Deed.

As to the date and parties.]—A partnership deed, like other deeds of settlement, commences with the date and names and description of the parties, and every one of the partners ought to concur therein: (see the forms 3 Con. Prec., Part XI., Nos. I. to XI. inclusive, pp. 162, *et seq.*, 2nd edit.)

Recitals.]—Recitals are often omittted altogether from partnership deeds, and lengthy recitals are rarely inserted. It is, however, a common practice to insert a short recital that the parties have agreed to become partners together: (see the form 3 Con. Prec., Part. XI., No. II., clause 2, p. 180, 2nd edit.); as also for the purpose of showing the nature of the business, the time it has existed, or the manner in which it had been previously conducted: (*id. ib.* clause A, *in notis*, p. 180.) Sometimes, also, recitals are inserted for the purpose of showing the title to the premises in which the business is intended to be carried on; as where one of the parties holds such premises either under a lease, or as the absolute owner; as also for the purpose of

showing that he has expended money upon such premises; or to show that money has been expended in erecting machinery or other improvements. So where a partnership is entered into between two brewers, who are generally also the proprietors of public-houses, it will be proper to state those facts in the recitals: (see the form 3 Con. Prec., Part XI., No. III., clause A, *in notis*, p. 194, 2nd edit.) Again, also, where partnership is entered into for the purpose of working a patent, it will be correct to recite when, how, and where such patent has been obtained (see the forms 3 Con. Prec., Part XI., No. X. clauses 2, and A, B, and C, *in notis*, pp. 230, 240, 2nd edit.), as also at whose expense such patent has been procured: (*id. ib.* clause 4, p. 241.) So, where implements and machinery, the property of some one or more of the partners only, are intended to be brought into the partnership concern, it is the common practice to show by the recitals of what they consist; and if, as it ought always to be, their value has been previously ascertained and determined, the amount of such valuation ought also to be set forth: (see the form 3 Con. Prec., Part XI., No., III., clause 4, pp. 194, 195, 2nd edit.)

Agreement for partnership.]—In the testatum clause or agreement for partnership, it is usually witnessed that the parties, in consideration of the mutual trust and confidence they repose in each other, mutually bind themselves and their representatives to enter into partnership upon the terms thereinafter specified and set forth: (see the form 3 Con. Prec., Part XI., No. I., clause 2, p. 163, 2nd edit.) If a premium is paid as a consideration for the partnership, the amount of such premium should be set out in the testatum clause, and the payment and receipt duly acknowledged in the same manner as in an ordinary purchase deed: (see the clause 3 Con. Prec., Part XI., No. II., clause C, *in notis*, p. 181, 2nd edit.; *ib.* No. VIII., clause 3, p. 227.)

Commencement and duration of partnership.]—The time of the commencement and duration of the partnership ought always to be stated in express terms; if the commencement is omitted to be stated, it will be construed to begin from the date of the articles, and parol evidence is inadmissible to show that it was intended to commence at any future period; and unless the time of duration is fixed, it will be in the power of either of the partners to dissolve the partnership at any time: (*Henry* v. *Birch*, 9 Ves. 537.) Still, it is by no means unusual to provide that either

party may determine the partnership upon giving the other some previous reasonable notice (as six calendar months for instance) of his intention to dissolve the same: (see the form 3 Con. Prec., Part X., No. I., clause 22, p. 171, 2nd edit.) It is also a common practice to qualify the duration of the term of partnership to the life-time of the parties (see the form 3 Con. Prec., Part X., No. II., clause 4, p. 181, 2nd edit.), although this is not necessary to produce that effect, because, where no precise time is fixed, the partnership will be dissolved by the death of any of the partners, and will therefore be determined by that event in all cases where there is no express stipulation to the contrary: (Coll. on Partnership, 114.)

Style of firm.]—The style of the firm should be set out in the articles of partnership deed in precisely the same terms it is intended to be described in all transactions connected with the partnership affairs, and the partners must be careful to act accordingly; for where members of a partnership covenant that the firm shall be carried on under a specified style; as that the style shall be A. B. & Co., it will be a breach of covenant for A. to sign those instruments to which the covenant refers in the name of A. & Co.; nor will it be a less breach of that covenant for B. to sign his own name, adding for self and partners: (Coll. Part. 114; and see 1 Jac. & Walk. 268.)

Nature of the business.—The nature of the trade, business, or profession should be accurately set forth, and this is particularly important where any of the partners carry on any other kind of trade or business besides that which is intended to be embraced by the partnership.

Place of business.]—It is generally the practice to state the place where the partnership business is to be carried on; and, in addition to this, it is very common to stipulate that the business shall be carried on upon some particular premises: but generally with a qualification, limiting the period it shall be so carried on there to so long a time as the parties shall mutually agree upon, or that it shall be carried on at the appointed place, or at such other place or places, as the said partners shall from time to time mutually agree upon (see the form 3 Con. Prec., Part X., No. III., clause 7, p. 195, 2nd edit.), and where the premises belong to any one or more of the partners individually, it is also common to provide that upon the determination of the

partnership, the possession shall be delivered up to such partners or other persons to whom the same shall so belong accordingly: (see the form 3 Con. Prec., Part XI., No. II., clause 5, p. 181, 2nd edit.)

Common practice to associate style of firm and place of business together in the same clause.]—It is a common practice to associate the style of the firm, and the place where the business is to be carried on both together in the same clause (see the forms 3 Con. Prec., Part XI., No. I., clause 4, p. 163, 2nd edit.; *ib.* No. II., clause 5, p. 181; *ib.* No. III., clause 7, p. 195), but sometimes they are set out in distinct and separate clauses: (see 3 Con. Prec., Part XI., No. IX., clauses 4 and 5 p. 233, 2nd edit.)

Capital.]—The manner and proportions in which the capital is to be advanced should be distinctly set out; and it should also be stated that each of the partners shall stand possessed of the capital stock of the partnership, in proportion to the amount of capital he has so advanced; and be considered as a creditor to that amount, and be allowed interest thereon accordingly: (see the form 3 Con. Prec., Part XI., No. I., clause 5, pp. 163, 164, 2nd edit.) In addition to this, it is a very common practice to stipulate that if either of the partners shall at any time advance any sums of money for the benefit of the partnership beyond the proportion he is bound to contribute, then the joint stock of the partnership should be liable to repay the same and interest before any other division of the profits shall be made: (see the form 3 Con. Prec., Part XI., No. II., clause 8, p. 182, 2nd edit.)

Where stock in trade, machinery, &c., form part of the capital.]—Where stock in trade, machinery, or the goodwill of a business are to form part of the capital, the value must be previously ascertained and determined, and the amount of such valuation be treated as so much amount of capital: (see the form 3 Con. Prec., Part XI., No. III., clause 8, pp. 195, 196, 2nd edit.; *ib.* No. IV., clause 4, p. 206.)

As to payment of capital into bankers hands.]—It is also common to provide that the capital brought into the partnership shall be paid into the hands of the bankers of the partnership, to the credit of the partnership firm; from whence no portion of it is to be afterwards withdrawn with-

out the consent of all the partners: (see the form 3 Con. Prec., Part XI., No. X., clause 10, p. 242, 2nd edit.)

As to interest upon capital on dissolution of partnership.]—Upon the dissolution of the partnership, each partner will be a creditor to the amount of the capital contributed by him; but in the absence of some express stipulation, he will not be entitled to any interest, but only to a share in the entire surplus: (*Burnel* v. *Hunt*, 5 Jur. 650.) Whenever, therefore, the capital is advanced in unequal proportions, it will be expedient to stipulate as to the manner in which the profits are to be apportioned: (see a form of this kind, 3 Con. Prec., Part XI., No. I., clause B, *in notis*, p. 164, 2nd edit.)

Where partner advancing money is to receive a per centage thereon.]—It is sometimes arranged that where the partnership capital is advanced in unequal proportions, the one who advances the most money shall receive a per centage upon the excess of capital advanced by him, and that the remaining profits shall be divided in equal proportions, in which case a clause to that effect ought always to be inserted: (see the form 3 Con. Prec., Part XI., No. I., clause C, *in notis*, p. 165, 2nd edit.; *ib.* No. II., clause 8, p. 182.)

Stipulation for a proportionate return of premium in case of a falling off of the business.]—Where a sum of money has been paid by way of premium for entering into partnership, it is sometimes arranged that, in case the profits of the business shall afterwards fall off, a proportionate part of the premium shall be returned: (see the form 3 Con. Prec., Part XI., No. II., clause K, *in notis*, p. 185, 2nd edit.)

Proportions in which profits and losses are to be received and borne ought always to be set out.]—Where an agreement constituting a partnership is silent as to the relative shares of the respective parties, the rule is to consider them as entitled to the profits equally: (*Farrer* v. *Robinson*, 1 M. & R. 527.) Still the proper course will always be to set out the proportions in which parties really intend the profits and losses to be received and borne, which it is generally arranged shall be in proportion to the amount of the capital which each advances, unless so far as relates to losses caused by the wilful neglect or default of either of the partners, who, in such case, are rendered liable to make good the same:

(see the form 3 Con. Prec., Part XI., No. I., clause 6, pp. 164, 165, 2nd edit.; *ib.* No. II., clause 10, p. 183.)

Where a specified sum is allowed in lieu of sharing profits.]—Sometimes a specified sum is allowed to a partner in lieu of his participating in a proportionate share of the profits. This often occurs where a dormant partner is admitted into the partnership, or an active partner becomes a dormant one, in which cases some specified annual sum, as 300*l.* for instance, is substituted for a participation in a share of the profits, which it is usual to stipulate shall be payable at all events, and that, if the profits prove insufficient, it shall be payable out of the capital (see the form 3 Con. Prec., Part XI., No. VIII., clause 6, p. 228), or it may be stipulated that the acting partners shall be entitled to draw some specified sum, either weekly or monthly, or at some other stated periods, out of such residue, to be accounted for by them on every settlement of accounts and division of the partnership profits: (*ibid.* clause A, *in notis*, p. 220.)

Mode of conducting business.]—In setting out the manner in which the business is to be conducted, it will be necessary first to consider how the expenses incurred for house-rent, taxes, insurance, servants, wages, and other expenses of a like kind incidental to carrying on the business are to be defrayed. This, it is generally stipulated, shall be discharged out of the clear gains and profits of the business; and if these prove insufficient, then that the same shall be made good by all the partners according to their relative proportions of the capital in the said partnership: (see the form 3 Con. Prec., Part XI., No. I., clause 9, p. 166, 2nd edit.)

Allowances for subsistence.]—It is next usual to provide some allowance to the partners for their subsistence, which is generally done by authorizing each partner to draw out of the said business, either monthly, weekly, or at some other stated period, any sum of money, not exceeding some specified amount, for his own use, to be entered by him in the cash book belonging to the partnership, and to be duly accounted for by him on a settlement of the partnership accounts: (see the form 3 Con. Prec., Part XI., No. I., clause 7, p. 165, 2nd edit.; *ib.* No. III., clause 6, p. 372.) This clause is a very important one, not only for the purpose of preventing disputes, but also to enable the partners to have an allowance for their necessary support before the

amount of profits can be ascertained, which cannot be done till the settlement of the yearly accounts.

Allowances for treating customers.]—In some partnership deeds, a clause is inserted by which any of the partners are allowed out of the joint stock all such sums of money as they shall expend in treating customers; but this is usually qualified with a proviso that the same shall be duly entered in the partnership books: (see the form 3 Con. Prec. Part XI., clause 13, p. 198.)

Where any of the partners reside on the premises.]—Where any of the partners reside on the premises it is also usual to stipulate that they shall occupy the same rent free. In such case it ought also to be stated by whom, and in what way, the expenses incurred in respect of rates, taxes, and all other outgoings; as also in keeping the premises in repair, are to be defrayed: (see the form 3 Con. Prec., Part XI., No. III., clause C, *in notis*, p. 198, 2nd edit.)

As to keeping partnership accounts]—With respect to the partnership accounts, the practice is to stipulate that proper books of account shall be kept, wherein all transactions relating to the partnership shall be entered, which, together with all deeds, bonds, bills, notes, securities, papers, and writings concerning the partnership affairs, shall be kept at the shop, counting-house, office, or such other place of safety as the partners shall mutually agree upon, and that each of the partners shall have access to the same without interruption from any other of the partners: (see the form 3 Con. Prec. Part XI., No. I., clause 10, p. 166, 2nd edit.) The latter part of this clause is, however, rather a formal, than an essential, part of it, and like many other rights declared by partnership deeds, confers no more than the partners would otherwise possess: (1 Jac. & Walk. 593; Coll. on Partnership, 115.)

Acting partners to afford dormant partners accurate information respecting the business.]—Where there are dormant as well as acting partners, it is also usual to provide that, in addition to the annual accounts, the acting partners will at all times afford the dormant partners such information relating to the partnership business as will enable the latter to form an accurate opinion as to the actual state of the partnership concerns: (see the form 3 Con. Prec. Part XI., No. VIII., clause 8, pp. 229, 230, 2nd edit.)

As to weekly balancing accounts.]—In some partnerships it is arranged that the accounts shall be balanced weekly, and the balance of the cash in hand paid in the name of the partnership firm into their bankers' hands, to be only drawn out again for the purposes of the trade: (see the form 3 Con. Prec., Part XI., No. III., clause 6, p. 197, 2nd edit.)

As to daily entries.]—It is also sometimes arranged that entries shall be made daily, in proper books of account, of all goods bought and sold, and in particular, that a cash book shall be kept for the purpose of entering an account of all cash received and expended: (see the form 3 Con. Prec., Part XI., No. VII., clause 7, p. 222, 2nd edit.)

As to monthly balancing of accounts where there are dormant partners.]—Where there are any dormant, as well as acting, partners, it is usual to stipulate that the acting partners shall be the keepers of the cash, bills, notes, and securities; but it is at the same time generally provided, that the accounts shall be balanced monthly; and that the cash book, and all other books of account, shall be kept at the counting house, and be open at all times during the usual hours of business to the inspection of all the partners: (see the form 3 Con. Prec., Part XI., No. VII., clause 8, p. 222, 2nd edit.)

As to cash received by a dormant partner.]—It is also frequently provided, where there are any dormant partners, that in case they shall at any time receive any cash on the partnership account, they shall forthwith deliver over the same to the acting partners; in addition to which it is sometimes stipulated that, in case of default in making such payment over, the dormant partner so offending shall pay some specified sum by way of liquidated damages: (see the form 3 Con. Prec., Part XI., No. VII., clause 9, p. 223, 2nd edit.)

As to conduct of partners in management of the business.] —With respect to the actual conduct and management of the business, where all the partners are active, it is a common form to stipulate that they will be true and faithful to each other, and diligently employ themselves in the partnership affairs, and render a true account of all transactions relating thereto when reasonably required: (see the form 3 Con. Prec., Part XI., No. I., clause 11, p. 167, 2nd

edit.) In addition to which it is often provided, that neither of the partners shall at any time during the continuance of the partnership engage in any other trade, business, or profession whatever (*id. ib.* clause 12, p. 167), and whenever it is desired that the partners are not to engage in any other business, this clause ought never to be omitted.

As to partnerships between attorneys or solicitors.]—In partnerships between attorneys or solicitors, it is usual to stipulate that neither of the partners will carry on business on his separate account, or carry on any proceedings whatever against the consent of his co-partner: (see the form 3 Con. Prec., Part XI., No. II., clause 13, p. 185, 2nd edit.) It is, however, sometimes provided that either partner may be authorized to transact business for any of his relations free of costs: (see the form *id. ib.* clause K, *in notis*, p. 186.) And it is by no means uncommon to stipulate that one of the partners shall have the sole superintendence of, and the entire profits arising from, the business of some particular clients: (see a form of this kind, *id. ib.* clause L, *in notis*, p. 186.)

Where one particular partner, or some of the partners, are to devote more time to the business than the rest.]—Where a junior partner is taken into a firm, or a partner is admitted who only contributes a small proportion towards the capital, it is a very common practice to provide that he shall devote the whole of his time and attention to the management of the business, and not be concerned in any other trade or business whatever; but that the other partners shall not be obliged to act any further in the management than they may think proper, or be disabled from entering into any other kind of business they may feel inclined to follow: (see the form 3 Con. Prec., Part XI., No. IV., clause 8, p. 208, 2nd edit.) Where there is a dormant partner or partners, the stipulations usually are that the active partners shall devote the whole of their time to the management of the partnership, and not engage in any other kind of business; but that the dormant partner or partners shall not be required to attend to it in any way further than he or they may think fit; or be precluded from carrying on any other trade or business they may think proper: (see the form 3 Con. Prec., Part XI., No. VII., clauses 10 and 11, p. 223, 2nd edit.)

Hiring of servants, taking apprentices, &c.]—With respect to the engaging clerks, shopmen, servants, &c., and taking

apprentices, it is generally stipulated that neither of the partners shall engage or discharge any such without the other's consent: (see the form 3 Con. Prec., Part XI., No. I., clause 13, p. 167, 2nd edit.) In the case of apprentices also, it is usual to stipulate how moneys paid by way of premium are to be divided; but it is generally stipulated that such premiums are to be apportioned according to the shares of the partners in the partnership capital: (see the form *id. ib.*) If either of the partners is to lodge or diet any apprentice, clerk, or servant, it is usual to provide that he is to receive an allowance for the same out of the profits of the partnership: (see the form 1 Con. Prec., Part XI., No. XI., clause 7, p. 247, 2nd edit.) It is also a common practice, where there is a managing partner, to stipulate that he shall instruct the apprentices in the business: (see the form 3 Con. Prec., Part XI., No. IV., clause 11, p. 209, 2nd edit.) A provision is also sometimes inserted, that some one or all the partners shall be at liberty to bind a son an apprentice to the business without paying any premium or other consideration for the same: (see the form *id. ib.* clause B, *in notis.*)

As to losses incurred by negligence, &c.]—It is also a common stipulation that any loss incurred by negligence is to be borne by the partner through whose default such negligence is incurred; as also that each partner shall be accountable for all moneys received by him on the partnership account: (see the form 3 Con. Prec., Part XI., No. III., clauses 11 & 12, p. 197, 2nd edit.)

Partnership liabilities.]—It is also proper to stipulate that each partner shall indemnify the partnership from all liability with respect to his own individual private debts; and not employ any of the partnership moneys or effects, except on the partnership account (see the form 3 Con. Prec., Part XI., No. I., clauses 14 & 15, pp. 167, 168, 2nd edit.), or draw or accept any bills of exchange or promissory notes, except in the regular course of the business, and on account of the partnership: (see the form 3 Con. Prec., Part XI., No. I., clause 18, p. 168, 2nd edit.)

As to dealings on account of the partnership.]—It will be expedient also to provide that neither of the partners shall purchase any goods on the partnership account, beyond some stated amount, without the previous consent of the other partners; nor enter into any contract whatever, or

advance any moneys on the partnership account, or give credit, or release any debt, or sign any bankrupt's certificate, insolvent's release, or letter of licence, or any other instrument whatsoever, whereby any debt may be either discharged or diminished, against the consent of the other partners: (see the form 3 Con. Prec., Part XI., No. I., clauses 16 & 17, p. 168, 2nd edit.), or become bail or security for any person whomsoever without the previous written consent of his copartners: (*id. ib.* clause 19; *ib.* No. II., clause 14, p. 186.)

Annual accounts.]—In all partnership deeds it is usual to have a clause by which it is stipulated that there shall be an annual settlement of the partnership accounts, generally upon some fixed day in the year. Such accounts are most commonly directed to be made up in writing, and the best plan is to arrange that they shall be entered in two or more books, according to the number of the members of the firm, each of which books is to be subscribed by all the partners, in testimony of their approbation thereof, which is declared shall be binding on them all, unless some manifest error shall be found therein, and signified to the partners within one year after signing of such accounts, in which case, but not otherwise, the error is to be rectified. And it is also further provided, that after such adjustment of accounts, the profits are to be divided between the partners according to their respective portions in the capital of the partnership: (see the form 3 Con. Prec., Part XI., No. I., clause 20, pp. 168, 169, 2nd edit.)

Dissolution of partnership.]—Partnership may become determinable by effluxion of time; by notice; by the death of either of the partners; or by expulsion. Where a partnership is entered into for a certain number of years, it will expire at the determination of that time without any express stipulation to that effect; as it also will by the death of any of the partners within that period. It is not, therefore, necessary to insert any express stipulation in the partnership deed for determining the partnership upon the happening of either of those events: but it will be otherwise where it is to be determined either by notice, or by expulsion; to authorize either of which, an express stipulation will be necessary, which should always be inserted when it is intended to determine the partnership by either of those means.

As to dissolution upon notice.]—Where the dissolution is

to be upon notice, it should be provided that, if either of the partners should become desirous of determining the partnership before its regular expiration by effluxion of time, then, upon giving some previous specified notice (usually six calendar months), the partnership, upon the expiration of such notice, shall determine either on the expiration of the six calendar months, or on such future day as in such notice shall be named: (see the form 3 Con. Prec., Part XI., No. I., clause 22, p. 172, 2nd edit.)

Where retiring partner is to be restricted from practising in the same line of business.]—Where, by terms of the partnership, a partner is entitled to retire upon notice, it is not unfrequent to stipulate that he shall not practise in the same line of business at the place where the partnership was carried on, or within a certain distance of the same; a clause that is often introduced in partnership deeds entered into between attorneys, or medical practitioners: (see the forms 3 Con. Prec., Part XI., No. II., clause 22, pp. 190, 191, 2nd edit.; *id. ib.* clause N, *in notis*, p. 191, 2nd edit.)

Where representatives of a deceased partner are to be authorized to dissolve the partnership, and to take the sole conduct of the business.]—Although it is not necessary to make any stipulation for determining the partnership in case of the death of either of the partners, still, where a working partner is admitted into the partnership, it is sometimes arranged that in the event of the death of the principal partner his representatives shall have the right of dissolving the partnership, and of taking upon themselves the sole conduct of the business, to the exclusion of the incoming working partner. Whenever this is intended, an express stipulation to that effect ought to be inserted in the partnership deed: (see the form 3 Con. Prec., Part XI., No. IV., clause E, *in notis*, p. 377, 2nd edit.)

Where either of the partners is to be authorized to dispose of his share in the partnership.]—If either of the partners are to be authorized to dispose of their share in the partnership business, or to admit any other member into the partnership, an express clause to that effect ought always to be inserted: (see the form 3 Con. Prec., Part XI., No. IV., clause F, *in notis*, p. 213, 2nd edit.; *id. ib.* No. XI., clause B, *in notis*, pp. 249, 250.) And where this right is intended to be restricted to one or more members of the firm, it will be found useful to insert a clause expressly

negativing such right to the other parties: (see the form 3 Con. Prec., Part XI., No. IV., clause F, *in notis*, p. 378, 2nd edit.)

As to dissolution by expulsion.]—The expulsion clause generally stipulates that if, contrary to the several agreements therein contained, either of the partners shall be guilty of any breach therein, the other partners shall be authorized, by giving notice in writing to the offending partner, to expel him from the partnership, from which time the partnership is to cease; but without prejudice to any of the remedies which either of the partners may be entitled to for breach of any of the stipulations contained in the partnership deed previous to such expulsion: the partner so expelled to be considered as quitting the business for the benefit of the partners by whom the notice shall be given. It is also the practice to add to this clause, that the partners shall cause a proper notice of the dissolution to be inserted in the *London Gazette*: (see the form 3 Con. Prec., Part XI., No. I., clause 29, pp. 174, 175, 2nd edit.)

Where expelled partner is not to trade or practise in the same neighbourhood, or for some specified period.]—In case of expulsion, it is sometimes stipulated that the expelled partner shall not trade or practise for some specified period within a certain distance from the place where the partnership business has been carried on; a clause that seems to have been more frequently inserted in partnership deeds between attorneys or medical men than between any other class of persons whatever; but this clause has been objected to by attorneys as being rather too stringent, and has consequently been nearly superseded by a provision which only restricts the expelled partner from transacting business on account of any persons who shall have been clients of the partnership firm: (see the form 3 Con. Prec., Part XI., No. II., clause O, *in notis*, p. 191, 2nd edit.)

Where retiring partner is to cease to practise.]—But where, by the terms of the partnership, it is arranged that one of the partners, after the expiration of a certain number of years, is to retire from the partnership and leave the entire business to the rest, it is perfectly fair to stipulate that the retiring partner is either to cease from practice altogether, or from carrying it on within a certain distance from the place of the partnership business, a clause that is often of the utmost importance in many of the partnership deeds

entered into between solicitors and medical men; where, in fact, the retirement of the partner forms part of the consideration for entering into the partnership, and for the premium that is paid on account thereof: (see the form 3 Con. Prec., Part XI., No. II., clause 22, p. 190, 2nd edit.)

Arbitration clause.]—Most modern partnership deeds contain an arbitration clause, by which the partners agree to refer all matters in dispute which may arise between them relating to the partnership concerns, which submission to reference is to be made a rule of court upon the application of either of the partners: (see the form 3 Con. Prec., Part XI., No. I., clause 30, pp. 176, 177.)

Where matters in dispute are to be referred to counsel.]—In partnership deeds between attorneys or solicitors, it is frequently stipulated that if any doubts or differences shall arise between them relating to their partnership matters, it shall be referred to counsel; one to be chosen by each of the partners, who, if they cannot agree in their award, are to call in the assistance of a third, whose opinion is to be binding and conclusive on all the partners: (see the form 3 Con. Prec., Part XI., No. II., clause P, *in notis*, p. 191, 2nd edit.)

Where matters in difference are to be decided by majority of the partners.]—Where a partnership consists of many persons, a clause is sometimes inserted by which it is provided that all matters in difference relating to the partnership concerns shall be decided by a majority of the partners. A learned writer on the subject, however, observes (Coll. on Partnership, 116), that if it is intended that in case of difficulties the majority shall have power to sell the whole concern, that intention should be clearly expressed, otherwise it may be annulled by other parts of the same instrument; and he instances the case of *Chapple* v. *Cadell* (Jac. 573), in support of this argument. In that case, it was agreed that a partnership in the publication of certain newspapers, consisting of a number of persons, should be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding; with a provision that any one wishing to retire should first offer his share to the committee at a certain price, and if they declined to buy, he might then sell to any other person; it was held that the majority were not able to sell the whole concern

without the consent of all, but that when two or three were desirous of retiring, they might sell their own shares without making an offer of them to the committee. And in another case (*Glossington* v. *Thwaite*, 1 Sim. & Stu. 124), where the wishes of the majority were to be ascertained, under a particular mode of notice prescribed by the articles, and that mode had been in two instances deviated from, Sir John Leach held that it was much too late for the partners who had acquiesced in the alterations to complain; and his Honour observed, in conformity with Lord Eldon's doctrine, "that though the parties would at law be bound exactly and in all points by the articles, yet in a court of equity it was otherwise."

Liquidated damages.]—In addition to all the above-mentioned clauses, partnership deeds frequently conclude with a stipulation that, on breach of any of the stipulations or agreements, the offending party shall pay the other a specified sum by way of liquidated damages (see the form 3 Con. Prec., Part XI., No. I., clause F, p. 177, *in notis*, 2nd edit.), in which case, for the reasons suggested in a preceding part of the present work (*ante*, p. 70), it ought to be explicitly stated that the sum is to be paid by way of liquidated damages, and not by way of penalty.

Power to amend partnership articles.]—A clause is often inserted at the end of the partnership deed authorizing the partners to alter any of the articles therein contained by writing under their joint hands, to be entered in any of the partnership books, which, when so done, is to have the same operation and effect as if originally inserted in the partnership deed: (see the form 3 Con. Prec., Part XI., No. III., clause 22, p. 204, 2nd edit.)

Winding-up and adjustment of partnership accounts, and general partnership affairs, on a dissolution of partnership.]—There are two modes of winding-up and adjusting accounts on a dissolution of partnership; one is by a general conversion of the partnership assets into money, and not a specific division of the articles, and dividing the produce, after providing for debts, amongst the partners in proportion to their several interests: (*Rigden* v. *Pierce*, Madd. & Geld. 353.) The other is, for some one or more of the partners to purchase the share of the retiring partner at a valuation. But, in the absence of any stipulation to the contrary, the former mode must be adopted, unless the partners are all willing to accede to the latter kind of arrangement; because the rights

of all the partners being equal, neither of them can claim a right to take a share of the others at a valuation: (*Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.) Whenever, therefore, it is intended that either of the partners is to be entitled to purchase the share of the other on a dissolution of the partnership, a clause to that effect should always be inserted: (see the form 3 Con. Prec., Part XI., No. I., clauses 25 to 28 inclusive, pp. 172 to 174; *ib.* No. III., clause 15, p. 199, 2nd edit.) It appears doubtful, however, whether a provision that on the bankruptcy of a partner his share should be taken by a solvent partner at a sum to be fixed by valuation is not void under the Bankrupt Laws; for if a provision of this kind were to be permitted, the effect would be that a partner could by contract control the disposition of his property in the event of his own bankruptcy. In the case of *Wilson* v. *Greenwood* (1 Swanst. 481), a clause of this nature was contained, not in the original articles, but in a subsequent deed which was executed in order to extend to bankrupts by a provision in the articles applicable to death alone, and evidently made in contemplation of that event; on which ground Lord Eldon held it to be clearly void, without deciding on the general question as to such provision in the articles themselves · (Coll. on Partnership, 119.)

How clause stipulating that a general account shall be taken on dissolution of partnership.]—The common practice in penning the clause relative to the general account on dissolution, either by notice or by effluxion of time, is to stipulate that within some specified time (usually six calendar months) after the expiration of the partnership, an account shall be taken of all the partnership matters, and after satisfying all demands upon the concern, the surplus of the partnership property is to be divided amongst the partners according to their respective proportions of the partnership capital: (see the form 3 Con. Prec., Part XI., No. I., clause 21, pp. 169, 170, 2nd edit.)

Indemnities given by partners to each other.]—In addition to this, it is also a common practice to stipulate that each of the partners shall give his bond to the others for payment of his just proportion of the partnership debts; and to assign and empower his copartners to sue for and receive all such partnership credits to which they may be respectively entitled upon such division of the partnership property, and to do all such acts as may be necessary for that purpose: (see the form, *id. ib.*)

Where the partnership is dissolved by the death of any of the partners.]—For the purpose of providing for a settlement of accounts where the partnership becomes determined by the death of either of the partners, it is generally stipulated that the surviving partners shall, within some certain specified period (usually six calendar months) after the decease of the party so dying, settle and adjust all accounts relating to the partnership with the deceased partner's representatives: (see the form 3 Con. Prec., Part XI., No. II., clause 18, p. 189, 2nd edit.)

Where continuing partners are to collect outstanding partnership credits.]—Where, upon a dissolution of a partnership, some of the partners are to continue to carry on the business on their own account, it is a very common practice to stipulate that they shall collect the partnership credits, and duly account for the same with the retiring partners; whilst the latter, on their parts, stipulate that they will, within some stated period (usually one year) after the dissolution, assign their interest in the partnership effects. In addition to which, it is commonly stipulated that the continuing partners shall give a bond, to those who retire, to collect the partnership credits and duly account for the same; and also to indemnify the retiring partners against the consequences of any proceedings brought in their names for the recovery of such credits: (see the form 3 Con. Prec., Part XI., No. III., clauses 16 and 17, pp. 200, 202, 2nd edit.)

Where business is to be carried on by surviving partner and representatives of a partner deceased.]—It is also sometimes stipulated, that in case either of the partners shall die before the expiration of a certain term in the partnership, the business shall be carried on during that period by the surviving partner at the joint risk, and for the joint benefit, of such surviving partner and the representatives of the partner deceased: (see the form 3 Con. Prec., Part XI., No. II., clause M, *in notis*, p. 188, 2nd edit.; *id. ib.* No. IV., clause 14, p. 212, 2nd edit.) At other times, it is provided that in the event of the death of either of the partners, his representatives shall have the option of carrying on the business with the surviving partners (see the form 3 Con. Prec., Part XI., No. X., clause D, *in notis*, p. 242, 2nd edit.); but in such cases it is frequently provided that the surviving partners are to have the sole management of the business, in which the deceased partner's representatives are to have no further right of interference than to inspect the partnership accounts,

and to assist in adjusting the same, unless they shall be required by the surviving partners to take an active part in the business: (*id. ib.*) But if they are required to do this, then it is but fair and reasonable they should be remunerated for their trouble, as also the risk they incur by carrying on the trade, thereby rendering their own property liable to the engagements of the business, whilst all the profits derived from it belong to those who claim beneficially under the deceased partner; under such circumstances, therefore, it will be proper to provide that the personal representatives of a deceased partner who shall be required to take an active part in the management of the business shall be properly remunerated for their trouble and risk: (see the form *id. ib.*, clause E, *in notis*, p. 408.) Without a provision of this kind, they will not be entitled to any remuneration whatever for their services: (*Burden* v. *Burden*, 1 Ves. & Beav. 170.)

Where continuing partners are to take partnership stock at a valuation.]—It is not unfrequently stipulated that upon the determination of the partnership, the continuing partners shall be entitled to take the partnership stock then remaining at a valuation, the amount of which is to be settled by arbitration; at the same time some stipulation ought to be made as to the time and mode of payment, as also the securities, if any, which are to be given to secure the same: (see the form 3 Con. Prec., Part XI., No. III., clause 15, p. 200, 2nd edit.; *id. ib.* No. IV., clause 13, p 211, 2nd edit.) For this purpose a bond is frequently stipulated to be given; which affords a more advantageous security than a covenant, because, in the former case, an action can be brought upon the bond in case default should be made in payment of any one of the instalments, whereas, if the remedy is upon covenant, no action will lie before all the instalments become payable: (*Rudd* v. *Price*, 2 H. Blackst. 547; *Coates* v. *Hewitt*, 1 Wils. 80.) Sometimes it is provided that the payment shall be secured by bills of exchange or promissory notes.

Where stock is to be valued in a particular manner.]—In some particular trades a provision is often made that the goodwill and stock shall be valued in a particular manner. Thus, for example, on the dissolution of a partnership between brewers, it may be provided that the goodwill of the business may be valued in some specified sum for every hundred or thousand barrels of strong beer which shall

yearly, on an average of the last three years, have been brewed by the said partnership: that the value of the stock of beer and ales belonging to the said partnership shall be calculated at the then net selling price of the same, allowing thereout a deduction of a certain per centage on the whole amount of such value; that the value of the stock of malt, hops, and coals belonging to the said partnership shall be calculated at their original cost price; and that the value of all improvements in the implements, or machinery, should be in the discretion of the persons selected for the purpose of valuing the same: (see the form *id. ib.*, note D, p. 200.)

As to disposition of office furniture, books, &c., where partnership between solicitors is determined by the death of either of them.]—In the case of partnership between solicitors, it is often stipulated that in the case of the death of either of the partners before the period of dissolution by effluxion of time, the surviving partner shall take the office furniture, books, papers, &c., at a valuation: (see the form 3 Con. Prec., Part XI., No. II., clause 17, p. 188, 2nd edit.)

Where outstanding credits are to be got in by a collector.] —In providing for the winding-up of the partnership affairs, it is often stipulated that the outstanding credits shall be got in by a collector, who is to receive a proper remuneration for his trouble: (see the form 3 Con. Prec., Part XI., No. IX., clause B, *in notis*, p. 236, 2nd edit.)

As to uncollected outstanding credits.]—With respect to outstanding uncollected credits, it is often found a convenient plan to stipulate that they shall be classified under the three several heads of good, doubtful, and desperate, and that these shall be allotted to the several partners, according to their respective shares in the partnership; and that all the partners shall enter into such acts and assurances as may be deemed necessary for effectually vesting the same, and enabling each other to sue for such assigned debts, the assigning party being indemnified by the party to whom he shall so assign against all subsequent costs and liability with respect to such assigned property (see the form 3 Con. Prec., Part XI., No. IX., clause C, *in notis*, pp. 236, 237, 2nd edit.); to which should be added a clause that neither party, after such division, will discharge any of such assigned debts: (see the form *ut ib.*, No. I., clause 24, p. 172.)

III. How Deed should be prepared when a Third Party is admitted to a Partnership Firm.

Usual practice where a third party is admitted to a partnership firm.]—When a third party is admitted to a partnership firm, the usual practice is to have a valuation made of the partnership stock, which is reduced into writing, and signed by the original partners and the incoming partner, the latter paying, or undertaking to pay, a proportionate sum as his contribution of the capital of the partnership. After which a partnership deed is prepared, by which he is constituted a member of the partnership firm conjointly with the other partners, all of whom, as well as the incoming partner, must be named as parties to and execute the deed.

Deed how usually penned.]—The deed, after setting out the date, and names and descriptions of the several parties, recites the original partnership deed; the agreement to admit the incoming partner; the valuation of the partnership stock; and the agreement of the incoming partner to pay a sum of money equivalent to his intended share of the capital of the partnership; after which it is agreed that the incoming partner is to be admitted partner to the share he is intended to take in the business, upon the same terms as are contained in the original partnership deed; with a declaration that the partnership effects shall be held by the partners in the same shares as they take in the partnership capital.

How consideration should be expressed to be paid or secured.]—If the consideration to be given by the incoming partner is paid by him on the execution of the deed, it should be so expressed in the testatum clause (see the form 3 Con. Prec., Part XI., No. VI., clause 5, p. 217, 2nd edit.); but if it be not paid immediately, then the mode in which such payment is to be paid or secured should be set out according to the fact: (see the forms *id.*, *ib.*, clauses A, B, and C, pp. 217, 218.)

Where incoming partner purchases an existing partner's share in the business.]—Where an incoming partner is admitted by purchasing a share of a partner who has reserved to himself this power of disposition by the original partnership deed, then, after reciting such deed, and that the retiring partner has agreed to assign his share to the

incoming partner, to whom he then assigns his share in the partnership, the continuing partners agree to admit him to the partnership; and it is further agreed that the business shall from thenceforth, during the residue of the term, be carried on by the continuing partners and incoming partner upon the same terms as are contained in the original partnership deed; concluding with qualified covenants from the retiring partner that he has good right to assign his share in the partnership, for quiet enjoyment and freedom from incumbrances, and for further assurance: (see the form 3 Con. Prec., Part XI., No. XVI., p. 270, *et seq.*, 2nd edit.)

IV. Extension of a Term of Partnership.

Where partners are desirous of extending the term of partnership, it may be done by a very simple form, which is commonly effected by deed poll indorsed on the original partnership deed. By this instrument, after the usual exordium, it will be proper to recite the determination of the term of partnership created by the within written indenture, and of the agreement to continue the partnership for a further term, which the said parties then mutually covenant to continue upon the same terms as the original partnership, concluding with a covenant for further assurance: (see the form 3 Con. Prec., Part XI., No. V., p. 214, 2nd edit.)

V. and VI. Dissolution of Partnership; and the Collection, Assignment, and Disposition of the Partnership Effects.

Recitals.]—In penning a deed for a dissolution of partnership, it will be proper to recite the original partnership deed, and the mode by which the partnership is dissolved; as by mutual agreement (see the form 3 Con. Prec., Part XI., No. XIV., clauses 1 and 2, pp. 262, 263, 2nd edit.), by effluxion of time (*ibid.*, clause A, *in notis*), or by notice (*ibid.*, No. XII., clauses 3 and 4, pp. 252, 253, 2nd edit.), and that the partnership has been dissolved accordingly.

Testatum clause.]—If the partnership has been dissolved by mutual consent, the testatum clause should state it to be dissolved with such consent (see the form 3 Con. Prec., Part XI., No. XIV., clause 3, p. 263, 2nd edit.); where it has been determined by effluxion of time, it should be stated to be in pursuance of the terms and

stipulations contained in the partnership deed (*id. ib.*, clause D, *in notis*, p. 264); and if by notice, it should be so expressed. If any pecuniary consideration is paid upon an assignment of any of the partnership effects, it is usually inserted in the subsequent testatum clause by which the assignment is made of the partnership stock and effects: (*id. ib.* No. XIV., clause 3, p. 263, 2nd edit.) It is not, however, essential that the deed should contain any testatum clause for dissolving the partnership, it being often the practice merely to recite that the dissolution has been made and inserted in the *Gazette;* which form is often adopted where some of the partners assign their shares in the partnership effects to the other copartners: (see the form 3 Con. Prec., Part XI., No. XII., clause 5, p. 253, 2nd edit.) So, where a retiring partner has agreed to assign his share in the partnership effects, for which he is to receive a pecuniary equivalent, it is a very common practice to recite this arrangement, and the mode in which the payment is to be made or secured; and instead of specifying this consideration in the testatum clause, to express the consideration for the assignment to be either "in consideration of the premises" (see the form 3 Con. Prec., Part XI., No. XII., clause 7, p. 254, 2nd edit.), or "for the considerations hereinbefore expressed."

How accounts are usually made up and settled on a dissolution of partnership.]—Upon a dissolution, the practice is either to wind up and collect the partnership credits, and after discharging all debts and other demands upon the partnership, to divide the surplus amongst the partners according to their proportional shares in the capital of the partnership, or some of the partners assign their shares to the others, upon receiving a pecuniary equivalent for the value of their shares.

Where partnership credits are collected and divided.]—Where the partnership credits are collected and divided according to the first mode, the deed, after dissolving the partnership in the manner we have already mentioned, contains a mutual covenant from all the partners, by which they bind themselves to make out accurate accounts, and that a final audit of the accounts shall be made and signed by all the partners; that the partnership credits shall be collected; and, after satisfying all demands upon the partnership, that the residue, and also all the uncollected partnership credits and effects, shall be divided between all the partners (see the form 3 Con. Prec., Part XI., No. XX.,

pp. 283, 288, 2nd edit.) according to their shares in the partnership.

As to appointment of a receiver.]—For the purpose of winding-up the partnership affairs, where the business is an extensive one, it is a very common practice to appoint a receiver. In this case the deed, after proceeding in the manner we have just pointed out, recites the agreement to appoint a receiver, who is appointed accordingly by all the partners, and the whole of the partnership credits and effects assigned to him at the same time, with usual power of attorney to sue for and give releases and discharges for the same. The partners then mutually covenant that they will not receive outstanding credits; to classify and divide between them all such partnership credits as shall not have been collected, which are to be allotted between them according to their respective shares in the partnership; that neither of the partners will release any of the outstanding credits, or any action or suit for the recovery of the same; concluding with a power for the receiver to reimburse himself all costs expended by him in the discharge of his duties, and exonerating him from being responsible for more money than he shall actually receive, or for any banker or other person in whose custody moneys received by him shall be placed for safe custody: (see the form 3 Con. Prec., Part XI., No. XX., clauses 9 to 18 inclusive, pp. 285, 288, 2nd edit.)

How shares in partnership credits are usually assigned from one partner to another.]—Where an assignment is made of a share in the partnership credits and effects from one partner to another, it is usually done in consideration of the one partner paying or securing to the other a sum of money equal to the value of the assigned share in such partnership property, which is assigned to the other partner accordingly; with power of attorney for enforcing payment, and to give releases, &c. The assigning partner then enters into general covenants with the assignee that he has not contracted any debt whereby the partnership effects can be in any way prejudiced; or received any of the partnership credits not duly entered on the partnership accounts; to confirm all acts done in exercise of the power of attorney; for further assurance; and not to release any actions, &c. On the other hand, the partner to whom the assignment is made covenants to discharge the partnership debts, and to indemnify the retiring partner therefrom; the deed concluding with a

mutual release between both the partners of all claims on account of the original partnership deed: (see the form 3 Con. Prec., Part XI., No. XIV., pp. 262, 265, 2nd edit.)

VII. Securities and Indemnities.

Securities for future payments.]—Where any of the partnership effects are assigned from one partner to another upon the dissolution of the partnership, it is a very common practice that the pecuniary consideration to be paid for such assignment, or some portion of it, shall be paid at some future period, usually by instalments payable at certain stated intervals, and secured by the bond of the partner to whom such assignment has been made.

Bond for securing future payments, how usually penned.]—By this bond, after the usual exordium, the partnership deed ought to be recited, and also the manner in which the partnership has determined, as, by mutual agreement, effluxion of time, notice, or otherwise, according to the true state of the facts; and that a valuation has been made of the partnership effects, and the value of the assigned share ascertained accordingly; after which should be recited the instrument by which the share in the partnership property is assigned by the obligee to the obligor; and this ought to be followed by the condition for avoiding the bond on payment of the moneys and interest for the assignment of the share by the several instalments therein mentioned, and indemnifying the obligee against all costs incurred on account of actions brought in his name to recover the partnership credits (see the form 3 Con. Prec., Part XI., No. XIII., p. 259, 2nd edit.; *id. ib.* No. XV., p. 226; *id. ib.* No. XIX., p. 280), or any other matters or things which the obligor may do in anywise relating to the partnership.

VIII. Notices relating to Partnerships.

Where the notice is to dissolve partnership under a power to determine it upon a six months' notice.]—Where there is a power to dissolve the partnership upon either of the partners giving to the other six months' previous notice thereof, the form is a very short and simple one, by which the one party gives the other notice of such intention, but which should be stated as given in pursuance of the power to that effect contained in the partnership deed: (see the form 3 Con. Prec., Part XI., No. XXI., clause 1, p. 289, 2nd edit.)

And where the partnership deed contains a stipulation that upon the dissolution of the partnership upon such notice the continuing partner is to indemnify the retiring partner from the partnership debts, a clause should be added to the above, requiring the continuing partner to execute a deed of indemnity accordingly, upon the same being duly tendered to him for that purpose; the retiring partner at the same time expressing his readiness to execute all such assignments as on his part might be required in pursuance of any such terms or stipulations as thereinbefore mentioned: (*id. ib.*, clause A, *in notis.*) The date should be inserted in the testimonium clause at the end, and the notice directed to the party by his usual name and address.

Where notice is given of intention to expel a partner for breach of covenant.]—Where it is intended to expel a partner from the partnership in pursuance of a power to that effect contained in the partnership deed, for any breach of covenant, the notice should be expressed to be given in pursuance of that power, and the nature of the breach should be set out, stating at the same time that the party giving the notice is thereby authorized to determine the partnership, and that he thereby declares the same to be dissolved accordingly: (see the form 3 Con. Prec., Part XI., No. XXI., clause 4, p. 290, 2nd edit.)

Notice of intention to purchase a share in the partnership on dissolution thereof.]—Where a party is to be entitled to purchase a share of the partnership upon its dissolution, the form of notice should state the intention, stating at the same time that the partnership either has expired or is about to expire, and the time at which such expiration has taken or will take place: (see the form 3 Con. Prec., Part XI., No. XXI., clause 5, p. 291, 2nd edit.)

General public notice of dissolution of partnership.]—Where a general notice of dissolution of partnership is to be given, it should state in concise terms that the partnership, for some time carried on by the partnership firm (setting out the style of the firm), has been dissolved; and if the business is to be thenceforth carried on under any other firm, then the style of new firm ought to be set out: (see the form 3 Con. Prec., Part XI., No. XXI., clause 3, p. 290, 2nd edit.) If any continuing partner is to settle the partnership affairs, it should be so stated in the notice: (*id. ib.*, clause B, *in notis.*)

CHAPTER X.

COMPOSITION DEEDS.

I. Preliminary Observations.

True state of debtor's affairs should be ascertained.]—In the management of all compositions with creditors, the first step the debtor's solicitor ought to take should be to ascertain, as accurately as circumstances will permit, the true state of his client's circumstances, the extent of his credits, the amount of his debts and liabilities, and what assets he is likely to be able to raise to discharge the claims which may be made upon him. To do this effectually, the accounts should be gone into and thoroughly examined; and, whenever the business is an extensive one, it will generally be advisable to employ some able accountant for the purpose. Without some certain degree of knowledge of the actual condition of affairs, it will be most difficult, if not impossible, to come to a right arrangement with the creditors, or in fact to determine what terms the party desirous of effecting the composition ought either to offer or accept.

As to opening communication with creditors.] — Being armed with the necessary information as to the true condition of the debtor's affairs, the next step for his solicitor to take will be to enter into communication, and strive to bring about a negotiation with some of the principal creditors, with a view of laying a foundation for a future arrangement to be entered into at a general meeting of the whole body of the creditors. In managing these proceedings, care must be taken to show no favour or partiality to any particular creditors over the rest; for if such a course were to be adopted, it would be sufficient ground for avoiding the whole composition, both at law and in equity: (*Cockshott* v. *Bennett*, 2 T. R. 763; *Jackson* v. *Lomas*, 4 *ib.* 166; *Feise* v. *Randall*, 1 Esp. N. P. C. 224; *Philp* v. *Denbridge*, 2 Vern. 72; *Middleton* v. *Onslow*, 1 P. Wms. 708; *Leicester* v. *Rose*, 4 East, 372; *Mawson* v. *Stock*, 6 Ves. 300; *Howden* v. *Heigh*, 3 Per. & Dav. 661.) Yet, notwithstanding, courts of equity will not enforce an agreement for a composition which secures to some of the creditors an advantage of the others, of which the latter have no knowledge; this will not preclude an arrangement from being entered into by which some of the creditors may obtain a preference, if it be notified to the others, and the latter assent to the arrangement: (*Jackson* v. *Mitchell*, 13 Ves. 586.)

Creditors consenting to composition are bound whether they execute the deed or not.]—If the creditors consent to the composition, and agree to execute the deed, it has been held that they will be bound by it even at law, whether they execute the deed or not; and that a simple verbal assent, if it can be proved, will be sufficient for the purpose, and preclude the creditor from suing for the original cause of action: (*Bradley* v. *Gregory*, 2 Camp. N. P. C. 283.) An assent to a deed of this kind may also be implied as well as expressed: (*Butler* v. *Rhodes*, 1 Esp. N. P. C. 236; *Boothby* v. *Sowden*, 3 Camp. N. P. C. 175.)

Composition with creditors ought never to be allowed to rest on mere agreement.]—It is seldom, however, advisable to let a composition between a debtor and his creditors rest upon a simple verbal consent, or even upon an agreement under hand only; for although an agreement to accept a less sum in satisfaction of a greater one than is due is binding in equity, it will not be binding at law: (Co. Litt. 212 b;

Pinnell's case, 5 Co. 117); being *nudum pactum* for want of a sufficient consideration: (*Stock* v. *Mawson*, 1 Bos. & Pull. 286; *Lodge* v. *Dicas*, 3 B. & Ald. 611.) Nor will even the acceptance of payments vary the strictness of this legal rule (*Heathcote* v. *Crookshanks*, 2 T. R. 24), unless there be some new and sufficient consideration, or the payment is guaranteed by a third person: (*Stienman* v. *Magnus*, 11 East, 390.) But if the instrument be under seal, then it will become binding at law as well as in equity: and therefore although it is always advisable, where on a meeting of the creditors the terms of the composition are agreed upon, immediately to get a memorandum to that effect signed by all the parties present, so as to bind them in equity, still such an agreement should be immediately followed by some more formal instrument, which will be binding upon them at law also. It will be proper also to observe that unless the composition be made by deed under seal, it will be no discharge of a specialty debt: (*Lowe* v. *Eginton*, 7 Pri. 604.)

How agreement for composition should be penned.]—Agreements for a composition should be clearly and concisely penned, yet no particulars should be omitted, which the deed intended to be made in pursuance of it is designed to embrace. Where, however, the agreement is merely to give the debtor time for payment, or to accept a composition for a lesser amount than the debts, or the payment is to be secured by sureties or the like, then the agreement may be very concisely drawn, being merely a memorandum by the creditors of their agreement to give time for payment, or to accept the composition, and that a regular deed shall be executed, which all the creditors who are parties to the deed will execute, and use their utmost endeavours to induce the other creditors to do the like; concluding with a proviso for avoiding the composition in case of the non-concurrence of the rest of the creditors: (see the form 3 Con. Prec., Part XII., No. II., p. 305, 2nd edit.) But where the whole of the debtor's property is to be passed over to and vested in trustees, for the benefit of his creditors, then the whole terms of the trust deed ought to be set out in the agreement. Thus, for example: suppose a trader possessed of real and personal estate, household furniture, and stock in trade, and other effects, the whole of which is intended to be conveyed and disposed for the benefit of his creditors, the agreement should be made between the debtor, his intended trustees, and such creditors as can be readily induced to

sign the same. The proposed conveyance and assignment should be recited, and the debtor should then undertake to convey and assign the whole of the property to the trustees, upon trust for the payment of his debts; to deliver a true statement of his property, and not to dispose of any portion thereof, or to release any debt, and to afford every assistance in his power to the trustees, in carrying out the trusts for sale. In consideration of these acts on the part of the debtor, his creditors grant him licence to follow his own affairs, in which, if any creditor who is a party to the deed molests him, he is to forfeit his debt; to which a clause is usually added for avoiding the deed in case of the non-concurrence of all the creditors. It is advisable to insert a clause authorizing any of the creditors to execute the composition deed, and receive the dividends upon their respective debts under it by attorney: (see the form 3 Con. Prec., Part XII., No. I., p. 303, 2nd edit.)

Composition deed an act of bankruptcy.]—It must be remembered that assurances of the above kind are acts of bankruptcy; still, to constitute them such, a petition for adjudication must be filed within three calendar months after its execution by the debtor: (stat. 2 Vict. c. 12.)

II. PRACTICAL DIRECTIONS FOR THE PREPARATION OF COMPOSITION DEEDS.

1. Various kinds of composition deeds.
2. Where an extended time is allowed for payment.
3. Where the creditors agree to accept a lesser amount than their debts.
4. Where the business is to be carried on under the direction of inspectors.
5. Where the debtor's property is conveyed or assigned upon trusts for sale.
6. Composition deeds by persons who are not traders.

1. *Various Kinds of Composition Deeds.*

Compositions entered into by traders with their creditors are usually of three kinds: by the first, the debtor is allowed time for payment; by the second, the creditors agree to accept a lesser sum than the amount of their debts, if the debtor shall pay the lesser amount within some given time, or in some specified manner; by the third, he is allowed to carry on his business for some specified time under the direction of inspectors, and if by that means he is enabled to pay off

all his debts within the appointed time, the creditors will release all further claims upon his estate, but which he is to give up for their benefit in case of his default in so doing; and by the fourth, he conveys the whole of his property to trustees upon trusts for sale for the benefit of his creditors. In other cases, the debtor's property is either conveyed or assigned upon trusts for sale for the payment of his debts, or the whole or some portion of his income is vested in trustees to be applied for that purpose.

2. *Where an Extended Time is allowed for Payment.*

How deed should be penned.]—Where a debtor being unable to make his engagements is allowed an extended time by his creditors, the latter grant him a letter of licence to carry on his business unmolested by them during such extended period, in consideration of which the debtor covenants to pay his demands in full, or at the rate of so much in the pound, within or at the expiration of the appointed time: (see the form 3 Con. Prec., Part XII., No. VI, p. 340, 2nd edit.) It is also a very common practice to arrange that such payments should be made by instalments. Sometimes one or more sureties are added by way of additional security; besides which, bills of exchange, or promissory notes, are often given, in which the sureties also concur by way of further security.

Where a surety for the debtor is a concurring party.]—Where the payment of a composition payable by instalments is secured by bills of exchange, in which a surety concurs, the proper parties will be the debtor of the first part, the surety of the second part, and the creditors of the third part. It should then recite the agreement for the composition, and the times at which the several instalments are to be made, and that such payments are to be secured by bills of exchange, drawn upon and accepted by the surety, as the surety for the debtor. The creditors ought to agree to accept the composition, in satisfaction of their respective claims upon the estate and effects of the debtor, who should also covenant to fulfil his part of the arrangement. A letter of licence should be granted him by the creditors, with a covenant from them not to sue him for their debts under pain of forfeiture of the same, and clauses should also be inserted for avoiding the deed in the case of non-concurrence of creditors, and authorizing the creditors to execute by attorney: (see the form 3 Con. Prec., Part XII., No. I., pp. 301, 304, 2nd edit.)

3. *Where Creditors agree to accept a Lesser Amount than their Debts.*

In the case of a composition between a debtor and his creditors, where the latter consent to take a lesser sum than the amount of their debts, the form is a very short and simple one. By this the debtor on the one part, and the creditors on the other, after reciting that the former is indebted to the latter, and that the latter have agreed to accept the composition, mutually agree to carry out the same, the debtor covenanting to pay the amount of the composition at the time, and in the manner therein mentioned; and the creditors granting him a letter of licence to carry on his business, and at the same time covenanting not to sue him for their debts, on pain of forfeiting all claim to the same; concluding with a clause for avoiding the deed, in case of the non-concurrence of all the creditors, and that creditors may execute by attorney: (see the form 3 Con. Prec., Part XII., No. II., pp. 3, 5, 2nd edit.)

Amount of debt should be either inserted in deed, or in a schedule annexed thereto.]—The amount of each creditor's debt should either be specified in the composition deed, or inserted in a schedule annexed to it; for a creditor who signs with the amount of his debt in blank, will be bound to the extent of all existing debts then owing by him, although the deed refers expressly to those only which are set out in the annexed schedule; so that where a creditor, after having executed a deed of composition, refused to set the amount of debt to his name, upon the ground of his having a security, he was held to have bound himself to the extent of his then existing debt, and that he could not recover upon the security: (*Herrhy* v. *Wall*, 1 B. & A. 103; S. C. 2 Stark. N. P. C. 195.)

Where proceedings in bankruptcy have been previously instituted.]—It sometimes happens that after proceedings in bankruptcy have been instituted against a debtor, he afterwards enters into a composition with his creditors, by which it is arranged that the proceedings shall be annulled, and the debtor's estate reassigned to him by the assignees, upon the debtor's fulfilling his part of the composition. The proper parties to a deed of this kind will be the assignees, creditors, and official assignees of the first part, the bankrupt debtor of the second part, and his creditors of the third part. The deed should recite the proceedings in bankruptcy, and

the terms of the composition, which the bankrupt should then covenant to carry out; and the assignees and creditors should covenant to accept the composition, and to join in a petition to annul the bankruptcy. The assignees should then reassign the estate to the bankrupt, and release all further claim upon him: (see the form 3 Con. Prec., Part XII., No. X., p. 359, 2nd edit.)

4. *Where the Business is to be carried on under the Direction of Inspectors.*

Where a debtor is to be allowed to carry on his business under the direction of inspectors, the parties to the deed should be the debtor of the first part, the inspectors of the second part, and the creditors of the third part. It is not unfrequent, in forms of this kind, to add here, in addition to the term "creditors," "and the agents or attorneys of creditors." This, however, is not only unnecessary, but really incorrect; for the names of the agents or attorneys ought not to be subscribed, but the names of the principals should always be inserted. It should next be recited that the debtor is indebted to his creditors, and that the latter have agreed that he shall be allowed to carry on his business for some stated period, under the direction of inspectors, and the creditors should grant a letter of licence, authorizing the debtor to carry on his business accordingly, and not to sue him for their debts in the interim, on pain of forfeiting all claim thereto. The debtor should then covenant for payment of his debts, in pursuance of the terms of the composition deed; to render a written account of his estate and effects; and, if required, to verify the same upon oath; that he will strive his utmost to promote the prosperity of his business; not to alienate or incumber his property or effects, or engage in any other trade or business, or give any creditor priority, or release any debt, or bring any action, unless with the consent of the directors; also to keep proper books of accounts, and make up and render accounts monthly. To the above mentioned clauses, it is usual to add a declaration that all moneys and securities belonging to the estate shall be paid into the hands of a banker, and not be drawn out again except for the purposes of the deed, and by a draft signed by the debtor and one at least of the inspectors: (see the form 3 Con. Prec., Part XII., No. IV., pp. 326, 332, 2nd edit.)

As to the application of moneys received from business.]—

With respect to the application of the moneys to be received from the business, the proper way is to authorize the inspectors to apply the same in the first place towards defraying the costs of preparing and executing the composition deed, and in satisfying the wages and salaries of clerks and servants and other persons employed in carrying on the business, and all other incidental expenses incurred in the conduct and management of the same; to allow the debtor a sum of money for his subsistence, payable at certain stated periods; to pay the residue rateably amongst the creditors; and to pay over the surplus (if any) to the debtor for his own use and benefit: (see the form 3 Con. Prec., Part XII., No. IV., clause 17, p. 331.)

Creditors of small amounts usually given a priority in payment.]—It is usual, however, in addition to the above provisions, to declare that creditors whose debts do not exceed a certain amount, as 10*l.* for instance, shall receive a priority in payment over the other creditors: (*id. ib.*)

Power to extend letter of licence.]—It will also be found expedient in most cases to give the inspectors power, without any further consent of the creditors, to extend the debtor's letter of licence to some certain stated period beyond the time originally limited by the composition deed: (*id. ib.* clause 18, p. 331.)

Covenants entered into on the part of the creditors.]—The creditors, on their part, ought to covenant to abide by the terms of the composition; and it is also a common practice for them also to covenant that if the debts are not paid under the present arrangement, they will release the debtor from all his liabilities thereon, upon his giving up his whole estate for the benefit of his creditors: (*id. ib.* clause 20, p. 332.) The whole deed should conclude with the proviso for avoiding the deed in case of non-concurrence of creditors; to which may be added a proviso that any of the creditors may execute by attorney: (*id. ib.*)

5. *Where Debtor's Property is conveyed or assigned upon Trusts for Sale.*

Parties.]—When the debtor's property is conveyed or assigned upon trusts for sale for the benefit of creditors, the proper parties are, first the debtor, secondly the trustees, thirdly two creditors, and fourthly the whole of the creditors.

The object of making two particular creditors parties, distinct from the whole bulk of creditors, is for the purpose of enabling them to become covenanting parties with the trustees for the due performance of the trusts; to obviate the inconvenience which must otherwise necessarily occur if such covenant was to be entered into with the whole body of the creditors, who, in that case, must every one of them be made parties to any action which may be brought against the trustees for any alleged breach of covenant: (see the form 3 Con. Prec., Part XII., No. III., clause 1, p. 308, 2nd edit.)

Recitals.]—Deeds of this kind contain very few recitals. In fact, the only recital commonly inserted, is the agreement for the composition, by which the debtor acknowledges that he is indebted to his creditors in the several sums set opposite to their respective names in the schedule thereunto annexed, and being desirous of discharging the same equally, he has agreed to convey his property to trustees upon trusts for sale for that express purpose: (*id. ib.* clause 2.)

How property should be conveyed or assigned.]—The property, whatever it may be, is then conveyed or assigned according to its particular nature and qualities, to the trustees, in the same manner as property of the like kind is conveyed or assigned to trustees for any other purposes of a settlement: (*id. ib.* clauses 3 to 8 inclusive, pp. 308, 311.)

As to copyholds.]—But if copyholds are included in the trust, the proper course will be for the debtor to covenant only with the trustees to surrender the copyholds upon the trusts of the deed, in order to save the extra expense of surrenders and admittances, both to the trustees and the purchasers under the trusts for sale: (see the form *id. ib.* clause A, *in notis*, p. 309.)

How mixed kinds of property should be passed to the trustees.]—The property should be conveyed and assigned according to the regular order adopted in other assurances of mixed kinds of property. If, therefore, the debtor should happen to be possessed of freehold, leasehold, and copyhold estates, household furniture, as well as his stock in trade and credits, the freehold estates should be first conveyed, the leasehold assigned, the copyholds covenanted to be surrendered, and the household furniture, stock in trade, credits, and effects assigned to the trustees according to

the nature and qualities of the several kinds of property, accompanied with a power of attorney, authorizing the trustees to sue for the credits, and give effectual releases, and to do all other acts necessary for the purpose of carrying out the objects of the trusts: (see the form *id. ib.* clauses 3 to 8 inclusive, and clause A, *in notis*, pp. 308, 311.)

Where the property consists of railway shares.]—If any portion of the property consists of railway shares, the shares should be transferred to the trustees by deed poll, according to the form prescribed by the Railway Acts: (see the form 3 Con. Prec., Part XII., No. III., clause B, *in notis*, p. 313, 2nd edit.)

Power of attorney should be granted to trustees.]—It will also be proper to give the trustees a power of attorney to sue for all moneys owing to the debtor, and to give effectual discharges for the same, to adjust and settle his accounts, to execute deeds, and to perform all such acts as the debtor himself could have done, with power to appoint a substitute or substitutes for any of the above-mentioned purposes: (see the form *id. ib.* clause 9, p. 311, 2nd edit.)

Declaration of trusts.]—The trusts declared are that the trustees shall collect the debts; sell the property; and, out of the proceeds of the sale, pay, first the expenses of preparing and executing the composition deed, and in collecting and getting in outstanding debts; and where any landed property is included in the trust, the costs of perfecting the title, or of enforcing the specific performance of any contract entered into with any purchasers; then upon trust to pay all the debts; and after satisfaction thereof, to pay over the surplus moneys (if any) to the debtor.

Importance of inserting clause that trustees' receipts shall be a sufficient indemnity to purchasers.]—A declaration should always be inserted, when the deed embraces any real property, that the trustees' receipts shall be a sufficient discharge to purchasers. The advantage of this clause is that the purchasers being thereby exonerated from seeing to the application of the purchase money, the trustees are thus enabled to make an effectual conveyance of the property without the concurrence of the creditors, notwithstanding the names of the latter, and also the amount of their respective debts are specified and set forth in the schedule annexed to the purchase deed. The above clause is therefore a most im-

portant one; for if it be omitted, the purchasers are bound to see that their purchase money is duly applied, and will only be exonerated therefrom so far as concerns such creditors as actually executed the purchase deed. In penning this clause, it will be more advantageous to declare that the receipts of the acting trustees for the time being shall be a sufficient discharge, &c., in preference to setting out the names of the trustees, to prevent the necessity there otherwise would be for the signature of all the trustees who had accepted the trusts, although they may have subsequently resigned and released all their estate in the premises to their co-trustees; because, notwithstanding this release of their estate, the trust still remains—a trustee being unable to delegate a personal trust or confidence which has been reposed in him: (*Crewe* v. *Dickens*, 4 Ves. 97.) Purchasers, however, who buy under trusts of this nature must bear in mind, that a declaration that the trustees' receipts shall be a sufficient discharge to purchasers will not be available as against any such incumbrances, such as judgments or mortgages which are prior to the composition deed; consequently, where any such incumbrances exist, the purchaser will be bound to see that the purchase money is duly applied in discharge of them in all cases where the incumbrancers are not made parties to the conveyance; but if the incumbrancers are made parties, then the purchasers will be exonerated from all responsibility as to the application of the purchase moneys.

Powers to compound debts, &c. should be inserted.]—In addition to the above-mentioned authorities conferred upon the trustees, it will be proper to give them power to compound or compromise debts, arrears of rent, and all other claims; and to refer to arbitration any dispute that may arise in relation to the winding-up and settlement of the accounts; as also to sign bankrupt's receipts, and to prosecute or defend any actions or suits, whether at law or in equity, relative to the trust estate and premises: (see the form *id. ib.* clause 16, pp. 316, 317.)

Where moneys collected are to be paid into the hands of bankers.]—It is usually arranged that the moneys, as they are collected by the trustees, shall be paid into the hands of some bankers, to the credit of the trust account, and this the trustees commonly enter into a covenant to do; and also to render an account of the trust estate, and to give all requisite information to the creditors of the general state of

the affairs of the debtor: (see the form *id. ib.* clause 18, p. 317.)

Covenants usually entered into by debtors.]—The debtor on his part covenants both with the trustees and his creditors generally, that he has made a full discovery of his effects; that he has good right to convey and assign; for quiet enjoyment, freedom from incumbrances, and for further assurance; to aid the trustees in the execution of the trusts, and not to revoke any of the powers thereby conferred upon the trustees, or release any debts or any actions brought on account of the same: (see the form *id. ib.*, clauses 21 to 27 inclusive, pp. 318, 321.)

Covenants and agreements entered into by creditors.]—The creditors on their part grant a letter of licence to the debtor, thereby authorizing him to follow his own affairs, and that any creditor suing him shall forfeit all claim to his debt; and they should covenant with the trustees to indemnify the latter from all damages or liabilities which they may incur in the execution of the trusts: (see the form *id. ib.* clauses 28, 29, and 36, pp. 321, 325.)

Provisoes commonly inserted in composition deeds.]—It is a common practice in composition deeds to insert a proviso that the creditors who shall not execute within a certain specified time, shall be excluded; but at the same time giving the trustees discretion to admit the claims of creditors after the expiration of that period, and also to allow the admission of claims accidentally omitted from the schedule, but so as in neither case to disturb any dividend made prior to such admitted claim. In the absence of a provision of the above kind, it seems that a creditor who does not execute the deed within the specified time will not thereby necessarily be excluded; but a court of equity will compel him either to accept or renounce the benefit of the trust (*Dunch* v. *Kent*, 1 Vern. 260); still that court does not consider it to be positively essential that he should actually seal and deliver the deed within the prescribed time, provided he indicates his assent to the terms of it, and his intention to act under it: (*Raworth* v. *Parker*, 27 L. T. Rep. 62.) In fact, even at law, although it is essential that a creditor should assent to a deed of this nature, in order to render it binding upon him, it is not absolutely necessary that he should execute the deed itself to render it so; a simple assent, provided it can be proved, having been held sufficient

for that purpose; and a verbal promise to accept a composition has been considered sufficient to preclude a creditor from suing for the original cause of action: (*Bradley* v. *Gregory*, 2 Camp. N. P. C. 283.) Generally speaking, indeed, creditors are as much bound by acting under a composition deed, as if they had actually executed it; and an assent to a deed of this kind may be implied as well as expressed: (*Butler* v. *Rhodes*, 1 Esp. N. P. C. 236; *Boothby* v. *Sowden*, 3 Camp. N. P. C. 195.) But if, on the one hand, a creditor who acts under a composition deed will be bound by it whether he executed or not, so, on the other hand, if he has been induced to sign a deed of this kind by means of any deception or misrepresentation, he will not be bound by it, although named as a party, and the instrument is actually executed by him (*Cooling* v. *Noyes*, 6 T. R. 263); for where any fraud or misrepresentation has been practised, by means of which the creditors have been deceived, or in any way imposed upon, the whole deed will be set aside as well in equity as at law: (*Parry* v. *Hughes*, 2 Eq. Ca. Abr. 54.)

Propriety of inserting proviso that matters in dispute shall be determined by a general meeting of the creditors.]—It is always advisable to insert a proviso, that in case any question of difficulty shall arise, the trustees are authorized to convene a meeting of the creditors, and submit all matters in difference to their determination: (*id. ib.* clause 33, p. 323.)

Proviso that fraud on debtor's part shall vitiate letter of licence.]—A proviso for avoiding the licence in case of any fraud or concealment on the part of the debtor should also be inserted: (*id. ib.* clause 31, p. 332.)

Power to change trustees.]—A power to change trustees, with the usual indemnities, should also be inserted: (*id. ib.* clause 35, pp. 323, 324.)

Where a debtor, who has been permitted to carry on his business under the direction of inspectors, afterwards assigns the whole of his effects for the benefit of his creditors.]—Where a debtor, who has been permitted to carry on his business for some stated period, under the direction of inspectors, afterwards assigns the whole of his effects for the benefit of his creditors, in pursuance of the terms of the deed of composition, by which that arrangement was entered into between him and his creditors, the deed of assignment, after

reciting the deed of composition, and arrangement, and that the debtor had continued to carry on the business under the control of the inspectors, in pursuance thereof, and that the term had expired by effluxion of time, and setting out what payments had been made by the inspectors, but that the debtor, being still unable to discharge the balance of the amount of his debts, had agreed to convey the whole of his estate for the benefit of his creditors, should convey such estate accordingly, and upon precisely the same trusts, and with the same powers and provisoes as upon an original assignment for the like purpose: (see the form 3 Con. Prec., Part XII., No. V., p. 333, 2nd edit.)

6. *Composition Deeds by Persons who are not Traders.*

Composition deeds are sometimes entered into with creditors by persons who are not in any kind of trade or business whatever, by which it is arranged either that the debtor's property shall be assigned to trustees upon trust, by sale or mortgage, to raise a sufficient sum to discharge all the debts, or his whole income is vested in trustees for that purpose, who are to discharge the debts thereout by instalments. In cases of the above nature there are often specialty, as well as simple contract debts to be provided for; and whenever this occurs, the regular course will be to arrange the several species of debts and classes of creditors in separate and distinct schedules, according to the legal priority of their respective claims. Thus, for example, suppose a party to be indebted upon mortgages, judgments, bond, and simple contract, the several kinds of debts ought to be set out in four distinct schedules. The mortgage debts should be contained in the first, the judgments in the second, the bond debts in the third, and the debts due upon simple contract in the fourth.

How creditors should be described in the deed.]—But although, in a case like the one above mentioned, the debts and creditors are thus classified, the creditors themselves may be, and usually are, set out in the description of the parties at the commencement, without any distinction whatever, being described generally as "the several persons whose hands and seals are hereunto subscribed," &c., in the same manner as where the composition is entered into with creditors all equal in degree, the deed being expressed to be made between the debtor of the first part, the trustees of the second part, and the creditors of the third part. It

should then be recited that the debtor is indebted upon mortgage, judgment, bond, and simple contract debts, and has entered into a composition with all his creditors, by which he has agreed to convey his property to trustees for the purpose of discharging these demands; the property is then conveyed or assigned to the trustees, who it is declared shall stand possessed thereof, upon trust, by sale or mortgage, to raise money for the purpose of discharging the debts according to the order in which they are set out in the several schedules, and to pay over any undisposed-of surplus moneys to the debtor: (see the form 3 Con. Prec., Part XII., No. VIII., p. 350, 2nd edit.)

Propriety of authorizing trustees to receive rents and profits.]—It will always be advisable, but particularly if an immediate sale or mortgage of the whole property is not to take place, to authorize the trustees to receive the rents and profits, and, after defraying expenses, to keep down the interest upon mortgages, and then to pay the interest upon debts carrying interest, and to apply the surplus in discharge of the principal: (see the form *id. ib.*)

Arrears of rent, or other credits, should be assigned to trustees.]—If any rents are in arrear, or any other credits are owing to the debtor, these ought also to be assigned to the trustees, with power of attorney to sue for all such credits, to distrain for arrears of rent, and to give effectual discharges for the same: (*Id. ib.*)

Covenants and agreements to be entered into by debtor and his creditors.]—The creditors should grant a letter of licence to the debtor, and also covenant not to sue or molest him upon pain of forfeiting all claim to their debts; with all the other usual clauses we have before pointed out; whilst the debtor ought to covenant with the trustees that he has good right to convey, &c., quiet enjoyment, and to sell the policy in either of the above-mentioned events: (see the form *id. ib.*, clauses 11 to 15 inclusive, pp. 354, 355, 2nd edit.)

Debtor who has paid his full composition is entitled to a release from his creditors.]—When a debtor, who has compounded with his creditors, has paid the full amount of the composition, he is entitled to a release from further claims in relation thereto. This is commonly done by deed poll, by which, after reciting the composition deed, and that the

debtor has paid the compositions, proceeds to release him from all their debts and claims: (see the form 3 Con. Prec., Part XII., No. XI., p. 366, 2nd edit.)

Sureties often made concurring parties.]—Sureties are sometimes concurring parties in composition deeds, for the purpose of assuring the due and regular payment of the composition. This is usually done through the medium of bills of exchange drawn upon and accepted by the surety as the surety of the debtor: (see the form 3 Con. Prec., Part XII., No. VI., p. 341, *in notis*, 2nd edit.) Arrangements of this kind are sometimes resorted to where proceedings in bankruptcy have been instituted against the debtor, which are afterwards annulled by consent of all parties, and a composition deed prepared, in which the sureties concur for the purpose of securing the payment of the composition according to the terms of such arrangement: (see the form 3 Con. Prec., Part XII., No. X., p. 359.)

BOOK THE FIFTH.

RELEASES, INDEMNITIES, GUARANTEES, AND INSURANCE OF TITLE.

CHAPTER I.

RELEASES.

Trustees and executors upon the performance of the trusts reposed in them, and satisfying all claims to which they are liable in either of those characters, are entitled to a release of all demands from the *cestui que trusts* or legatees. This is properly done by deed, which is prepared by the solicitor of the trustees or executors at the costs of the *cestui que trusts* or legatees.

Release from a legatee to an executor.]—A release from a legatee to an executor is a very simple form. After the usual exordium, the will appointing the executors and bequeathing the legacy, as also the testator's death and probate of his will, and the amount of the legacy duty which has been deducted, is briefly recited; after which the legatee acknowledges to have received the legacy less the legacy duty, and releases the executors from all claims and demands in respect of the same: (see the form 2 Con. Prec., Part VI., Sect. I., No. I., pp. 506, 507, 2nd edit.)

Where several legatees concur.]—Several legatees may, however, concur in the same instrument, by which con-

siderable expense may be saved, and a very slight variation only in the form will be required. This, perhaps, is best done by reciting that the executors have paid the several legacies to the several parties entitled thereto, the latter of whom should then severally release the executors therefrom, and from all claims and demands whatsoever in respect of the same: (see the form 3 Con. Prec., Part VI., Sect. I., No. II., pp. 508, 509, 2nd edit.)

Where the legacies are directed to be paid at a future period.]—If the payments are not to be made until after the death of some other person, or until the parties attain a certain age, as twenty-one for instance, or marry, this should be set out in the recitals, as also that the required events had taken place before the payments were made: (*id. ib.*, clauses 2, 3, 4, and 5, pp. 508, 509, 2nd edit.)

As to releases for the residuary estate.]—Where the executors pay over the residue to a residuary legatee, in the release given by the latter should be recited the will appointing the executors, the residuary bequest, the death of the testator, the probate of his will, and that the executors have discharged all the testator's debts, funeral expenses, and the whole of the legacies bequeathed by the will, and the amount of the residuary estate, and that the whole of this, after deducting the legacy duty, had been paid to the residuary legatee, and then the residuary legatee should release the executors from all further claims in respect of the residuary estate: (see the form 2 Con. Prec., Part VI., No. IV., pp. 512, 513, 2nd edit.)

Where there is a probability that future claims may be made upon the testator's estate.]—It sometimes happens that there is reason to apprehend some future claims may possibly be made upon the testator's estate. In cases of this kind the executors have a right to retain a sufficient amount of assets in their hands to meet those claims; and when this is not done, or if there is reason to suppose the sum retained may be insufficient for the purpose, it will be proper to require that the legatees upon receiving their legacies shall indemnify the executors against all subsequent claims upon the testator's estate. This may be effected either by deed poll, or by indenture; by which, after reciting the will, the death of testator, the probate and payment of the legacies, the several legatees, if there is more than one, should release the executors from all claims in respect of their legacies,

and the trusts of the will, and by a further testatum clause, covenant to indemnify the latter against any such subsequent claims as may be made upon the testator's estate: (*id. ib.* No. IX., pp. 521, 523, 2nd edit.)

In this case a still better and less expensive security can be given by a guarantee from the *Law Property Assurance Society*, of which full particulars are given in a subsequent page.

Where the indemnity is by bond.]—Sometimes a bond is given to the executors by way of indemnity. In this case the bond recites the will appointing the executors, and the bequests to the legatee, the death of the testator, and the probate of his will, and also that the executors have agreed to pay the legatee his legacy upon his indemnifying them in case of a deficiency of assets; and the condition of the bond must be, that the legatee will indemnify the executors accordingly: (see the form 2 Con. Prec., Part VI., Sect. II., No. IX., p. 550.)

Where contingent interests are assigned.]—It sometimes happens that property has been settled by a marriage settlement upon the husband and wife and the issue of the marriage, and in case there should be no issue who should acquire a vested interest in the trust property, either the husband or wife is to become absolutely entitled to the same. Now it very often occurs, where there is no issue of the marriage, and a physical, although not a legal, certainty that there never can be any, that the parties absolutely entitled are desirous of having the settled property in their own possession. Still, as the law presumes the possibility of parties married having children, without any regard to physical impossibilities, trustees, whenever they assign or deliver up the trust property under such circumstances, are clearly entitled to be indemnified against any responsibility they may thereby incur. This is generally done by a bond in a penal sum in double the amount of the trust fund, in which the settlement ought to be recited, and the trusts sufficiently set out to show the nature of them; after which it should be recited that there is no issue of the marriage or any prospect that there will be any such, and that the trustees have therefore, at the request of the parties absolutely entitled to the trust fund in default of such issue, paid, assigned, or delivered up the same to them accordingly, upon their agreeing to indemnify the trustees from all liabilities they may thereby incur; and the conditions of the

bond should be to indemnify them accordingly: (see the form *id. ib.* No. XIV., p. 563, 2nd edit.) This bond should be accompanied by a general release, by which the *cestuis que trust* release the trustees from all claims and liabilities in respect of the trust estate. Both these objects, indeed, may be contained in the same instrument, by substituting a deed of covenant for a bond. The recitals will be the same as in the bond, and by the first testatum clause the *cestuis que trust* must release the trustees from all claims and liabilities in respect of the trust estate; and by a further testatum clause they must covenant to indemnify the trustees from all liabilities they may incur by having paid, transferred or delivered up such trust estate.

As to releases to trustees.]—Releases to trustees under deeds of settlement are penned in precisely the same form as those we have just before been treating of. The deed of settlement creating the trusts must be recited, and it must be shown by the recitals that the trusts have been fully performed, after which the *cestuis que trust* should release the trustees from all further claims in respect of the same. If a simple release only is intended, then a deed poll will be the proper instrument; but where, as in the instance we have just before noticed, the trustees are to be indemnified by the *cestuis que trust*, then an indenture will be the right kind of instrument to employ: (see the form *id. ib.*, No. X., pp. 524, 525, 2nd edit.)

Releases by ward to a guardian.]—A release to a guardian from a ward may be penned in the same way as a release to executors or trustees. It may, however, be done in a very brief form, without even reciting the instrument by which the guardian is appointed, the death of the parent, or in fact any recital whatever; the ward, without any preface, simply releasing the guardian from all claims concerning the management of his property during his minority, or any cause, matter or thing relating thereto: (see the form *id. ib.*, No. VIII., p. 520, 2nd edit.)

Where disputed accounts have been adjusted and paid.]—Where disputes have arisen between parties as to the amount of moneys due from one to the other upon a final adjustment, it may often be advisable to have a release from the creditor upon his receiving payment, particularly where the sum paid is less than the amount originally demanded. This may be done either by deed poll or by indenture. In either case the nature of the claim should be recited; as also the

dispute and final adjustment and payment, and then the creditor should release the debtor from all future claims in respect of the same: (see the form *id. ib.*, pp. 515, 516, 2nd edit.)

Releases between partners.]—Upon a dissolution of partnership, it is the usual practice for the partners mutually to release each other from all claims and demands on the partnership account. This may be comprised in a very brief form, in which, after reciting that several dealings and transactions have taken place between the partners, which have been all wound up, each of the partners releases and exonerates the other of them from all claims on the partnership account, or of any matter, cause or thing whatever: (see the form *id. ib.*, No. VI., p. 517, 2nd edit.) Rather a longer form is, however, the one most usually adopted for the above purpose, in which it is recited that the partners have for some years past carried on the partnership business (stating the kind of business, and also the style of the firm and place of business), and that they have dissolved partnership, of which due notice has been inserted in the *Gazette*, and that all the partnership accounts have been wound up and finally adjusted; after which the partners mutually release each other from all further claims on the partnership account: (see the form *id. ib.*, No. VII., pp. 518, 519, 2nd edit.)

As to releases from creditors to a debtor who has compounded with them.]—Where a debtor who has compounded with his creditors pays the full amount of his composition, he is entitled to call upon the latter for a release from all further claim upon him. This release may be done either by a deed poll or by an indenture. In either case the instrument should recite the composition deed sufficiently to disclose the nature of the composition entered into; and should then show that all the terms of such composition have been duly complied with by the debtor, after which his creditors should release him from all further claims: (see the form 3 Con. Prec., Part XII., No. XI., pp. 366, 367, 2nd edit.)

CHAPTER II.

INDEMNITIES.

We have noticed, in a preceding part of the present work, that where the title is a bad, or even a doubtful one, a vendee cannot be compelled to complete his purchase with any kind of indemnity the vendor may offer him; and also, on the other hand, that a purchaser has no power, under similar circumstances, to call upon a vendor to indemnify him against any defects in the title; all the former has a right to do in such case, is, either to rescind the contract *in toto*, or to accept such a title as the vendor really has the power to confer upon him. Still, for all this, there is nothing to prevent a vendor and vendee from entering into an arrangement for any indemnity they may think proper to agree upon, the nature of which must depend in great measure upon the defect or danger it is intended to guard against. It sometimes happens that a vendor is unable to show any more than a mere possessory title from the loss or absence of title deeds, or any other documents necessary for the manifestation, support, or defence of his title; or there may be parties who, if living, would have claims upon the property, but may be believed to be dead, and without leaving issue, or any other person entitled to make claim through or under them, but there is no proof of the latter facts; or the vendor's title may be a contingent one, depending upon his leaving issue at the time of his decease, or any other contingent event, which may or may not happen, and which the vendor has no means of destroying so as to acquire an absolute and indefeasible estate in the premises. Other defects may arise from the absence of proof of the discharge of incumbrances, such as portions to children, mortgages, or the like, which are supposed to have been long since paid off and discharged, although the vendor is unable to obtain any evidence of those facts. In the case, also, of the assign-

ment of the term in leasehold premises by the original lessee, as he still remains liable to all express covenants entered into by him in the lease, notwithstanding such assignment (*Orgill* v. *Kempshead*, 4 Taunt. 642), and even the acceptance of the assignee as tenant by the lessor (*Barnard* v. *Godscall*, Cro. Jac. 309; *Brett* v. *Cumberland*, *ib*. 522; *Ventrice* v. *Goodcheap*, 1 Roll. Abr. 522; *Thursby* v. *Plant*, 1 Sid. 402: *Edwards* v. *Morgan*, 3 Lev. 233; *Auriol* v. *Mills*, 4 T. R. 94), it is the usual practice for a lessee, upon executing such assignment, to require the assignee to indemnify him against these covenants, which is generally done by an express covenant to that effect contained in the deed of assignment. But as this instrument is delivered over to the assignee, and remains in his custody, a scrupulous vendor sometimes requires either a bond of indemnity, or a separate deed of covenant, by which means he is enabled to retain the instrument of indemnity in his own custody.

Indemnity by way of insurance.]—A more satisfactory security, however, can now be had by means of a policy taken out with the *Law Property Assurance Society*, which, at a comparatively small cost, will issue a guarantee by way of indemnity, and thus relieve both parties from the inconvenience of asking or giving personal security, which, after all, might prove to be worthless. In a subsequent chapter will be given a full account of this new and useful application of the principle of assurance to the security of title.

Where the defect is caused by the loss of title deeds.]—Where the defect in the title is caused by the loss of the title deeds, a purchaser is often satisfied with a bond from the vendor, conditioned to be void if the vendor shall, within a certain stated period, deliver over such title deeds to the purchaser, or if the latter shall not be disturbed in the peaceable enjoyment of the premises on account of the loss of such deeds, or if the vendor shall pay the purchaser all damages and expenses he may incur on account of such loss: (see the form 2 Con. Prec., Part VI., Sect. II., No. XII., p. 559, 2nd edit.) Sometimes, however, it is arranged that the vendor shall assign or convey other lands by way of indemnity. This is usually done by indenture, by which, after reciting the loss of the deeds and agreement for the indemnity, the vendor either conveys or demises other lands to a trustee or trustees, upon trust to indemnify the purchaser in the case of the loss of the deeds, and to raise money by way of sale or mortgage sufficient to repay the

purchaser all damages and expenses he may at any time incur on account of the loss of such deeds, or any other defect in the vendor's title; with a proviso for cesser of the term on the vendor delivering over the deeds to the purchaser, or if the latter remains in undisturbed possession of the premises for some certain stated period, or on the vendor's paying him the full amount of all damages and costs he may incur in consequence of the loss of such deeds or defective title in the vendor. Added to this, the vendor usually enters into a covenant with the purchaser to indemnify him against the loss of the deeds, and any defects in his title; and also into absolute covenants with the trustees that he has good right to convey or demise the premises thereby conveyed or demised (as the case may be); for quiet enjoyment, freedom from incumbrances, and for further assurance; to which ought to be superadded the usual power to change trustees: (see the form 2 Con. Prec., Part VI., No. XI., pp. 555, 558, 2nd edit.)

Where the vendor undertakes to refund the purchase money in the case of eviction.]—In some cases, whether the defect in the title arises from the loss of the deeds, the inability of the vendor to show more than a mere possessory title, or from any other cause, the vendor enters into either a bond or a covenant to repay the whole amount of the purchase money in case the purchaser is evicted from the purchased property within some certain stated period: (see the form 2 Con. Prec., Part VI., Nos. I. and II., pp. 530, 532.) The repayment of the purchase money in case of the purchaser's eviction is also sometimes secured by the conveyance or demise of some other property of the vendor, upon trust, in case of the purchaser's eviction, to raise by sale or mortgage a sufficient sum of money to repay the purchaser his purchase money, as also any damages or costs he may have incurred in defending any action brought against him for the recovery of the possession of the purchased premises: (see the form 3 Con. Prec., Part VI., Sect. II., No. IV., pp. 537, 2nd edit.)

How instrument should be penned where vendor can only show a possessory title.]—Where the vendor is unable to show more than a mere possessory title, that fact ought to be recited, as also the conveyance of the premises to the purchaser; and if the instrument of indemnity is a deed of covenant, the vendor should covenant with the purchaser to

repay him his purchase money in case of his eviction within some stated period by any person having a rightful title to the property: (see the form 3 Con. Prec., Part VI., Sect. II., No. I., p. 530.) If the indemnity is by bond, it must be conditioned to be void if the purchaser shall remain in undisturbed possession of the premises, unmolested by any person having rightful title to the same; or, in case of his eviction, if the vendor should repay him the purchase money upon his being ready, at the request of the vendor, to reconvey all such estate (if any) as he may possess in such premises: (see the form 2 Con. Prec., Part VI., Sect. II., No. II., p. 532, 2nd edit.)

Stamp duties on bonds of indemnity.]—It may be proper here to remark, that the stamp which attaches upon bonds of the above kind will be the 1*l.* 15*s.* common deed stamp; for the stamp which attaches on bonds given by way of collateral securities, relates only to mortgage securities.

As to bonds for quiet enjoyment against all mankind.]—Where a vendor is unable to show any title, he sometimes enters into a bond for quiet enjoyment against all mankind: (see the form 2 Con. Prec., Part VI., Sect. II., No. VII., p. 545.) In this case, after reciting the purchase and the agreement to give the indemnity, the bond is conditioned for the peaceable enjoyment of the purchaser without eviction or disturbance by any person, and indemnified by the vendor against all incumbrances whatsoever: (see the form 2 Con. Prec., Part VI., Sect. II., No. VII., pp. 545, 546, 2nd edit.)

Where the indemnity is against particular claims only.]—But where a vendor is to indemnify a purchaser against any particular claims or incumbrances, then the nature of such claims or incumbrances should appear on the face of the instrument, and it should also be clearly shown what the purchaser is to be indemnified against. Thus, for example, suppose a testator had devised the purchased lands to A. B. for life, with remainder to his first and other sons in tail, with like limitations in favour of C. B. and his issue, with the ultimate limitation to his own right heirs; and A. B. having survived the testator, but dying a bachelor, and C. B. having gone abroad, and no intelligence having been received of him for several years, and he being presumed to be dead without having left lawful issue, the testator's heir-at-law, E. F., had entered into the possession of the pre-

mises; and having afterwards contracted to sell the premises, had agreed to indemnify the purchaser against any claims that might be set up by C. D. or his issue; in such case it would be proper to recite enough of the will to disclose the nature of the limitations to A. B. and C. D., with the ultimate limitation to the testator's right heirs; and also the death of the testator, and probate of his will; the death of A. B., a bachelor; the supposed death of C. B. without issue; and the entry of the vendor as the testator's heir-at-law; followed by a recital of his conveyance to the purchaser, and his agreement to indemnify the latter against C. D.'s claims. If the instrument of indemnity is a bond, it should be conditioned to be void if the purchaser should hold the purchased premises without eviction or disturbance from C. D., his issue in tail, or any persons rightfully claiming under him; or if the vendor should repay him the full amount of his purchase money in case of such eviction: (see the form 3 Con. Prec., Part VI., Sect. II., No. III., pp. 534, 536, 2nd edit.) If the indemnity is in the form of a conveyance or demise of other lands, upon trust to indemnify the purchaser in manner hereinbefore mentioned by way of sale or mortgage, the premises must be conveyed or demised, and limited accordingly: (see the form *id. ib.*, No. IV., pp. 537, 539, 2nd edit.)

When an indemnity is given against any dormant incumbrance, the instrument creating it ought to be recited.]—In the case of indemnities against dormant incumbrances, such as those we have just before enumerated (*ante*, p. 705), the instrument creating the incumbrance should be recited; the conveyance of the premises to the purchaser; the supposition that the incumbrance is discharged; and the agreement to indemnify the purchaser therefrom, and from which he may be indemnified accordingly by any of the modes which we have previously suggested: (see a form of this kind, 2 Con. Prec., Part VI., Sect. II., No. V., p. 540, 2nd edit.)

As to covenants by assignee of a term to indemnify the lessee against the covenants in the lease.]—Where an assignee of a term is to indemnify the original lessee against the covenants of the lease, the instrument of indemnity should recite the lease, setting out therein that it was granted subject to the payment of the rents and observance and performance of the covenants therein contained on the lessee's part to be paid, observed, and performed; after this should be recited the assignment to the purchaser, and the agreement for the

indemnity. If such indemnity is by bond, it should be conditioned to be void if the assignee shall pay the rents, and observe and perform all the covenants of the lease on the tenant's part to be paid, observed and performed, and save the lessee harmless and indemnified therefrom. If the indemnity is by a deed of covenant, then the form of the covenant itself should be in precisely the same terms as if it had been contained in the deed of assignment: (see the form 1 Con. Prec., Part II., Sect. II., No. I., clause 11, p. 247, 2nd edit.)

Where one of the conveying parties is a minor.]—It not unfrequently happens that one of the conveying parties is a minor, and therefore under a legal disability to convey his or her estate and interest in the property. In a case so circumstanced, it is sometimes arranged that the vendor shall retain some portion of the purchase money in his own hands until the minor comes of age, and executes the conveyance; at others, the vendor enters into a bond by way of guarantee that the minor, when of age, shall execute the instrument: (see the form 2 Con. Prec., Part VI., Sect. II., No. XV., pp. 566, 567, 2nd edit.) If the minor is a female, it will be necessary, in addition to the condition for avoiding the bond in case the minor shall execute on attaining twenty-one, to add, "or in case of her marriage or death in the meantime, she and her husband, in case of her marriage, or her heirs, executors, or administrators, in case of her decease in the meantime, shall, at the request of the said (*purchaser*), his heirs or assigns (or executors, administrators or assigns, as the case may be), but at the costs of the said (*vendors*), their heirs, executors or administrators, make, do, acknowledge, enter into, execute and perfect such assurances for effectually conveying and assuring the estate and interest of the said (*minor*) in the said premises according to the limitations declared concerning the same in and by the said recited indenture, as the said (*purchaser*), his heirs or assigns (or executors, administrators or assigns), or his or their counsel in the law shall require, THEN, &c."

Bond of indemnity to be prepared at vendor's expense.]—As an indemnity of this kind is caused by a defect in the vendor's title, the bond of indemnity must be prepared at his expense.

Where the vendor's estate is dependent on a contingency.]—Where the vendor's estate or interest in the property is de-

pendent upon a contingency, as where he takes an estate in fee, subject to a limitation by way of executory devise in case he shall die without lawful issue, the safety of a title under him will depend upon the probability of whether or not he will leave any issue that will survive him. If he does so, his estate will become absolute, and a title under him will then be unimpeachable; but if he dies without leaving issue, then his estate will determine, and the lands will immediately pass over and become vested in the executory devisee. To meet a case of this kind, it has been sometimes arranged that the purchaser shall be let into possession of the premises, and that the purchase money shall be paid into the hands of mutual trustees on behalf both of vendor and purchaser, who are to invest the same, either in the funds, or some other specified securities, and pay the dividends, &c., to the vendor during his life, or until the happening of the contingency, whatever it may be, upon which his estate is either to become absolute or determine; in the happening of the former event, the purchase moneys or securities are to be paid over or assigned to the vendor or his representatives; in the latter, to be repaid or assigned to the purchaser. Where the nature of the interest sold is such that the purchaser can neither be let into the possession, or derive any actual benefit from the property until the happening of the contingency, then it is usually arranged that the dividends shall accumulate, and, together with the principal, be paid over to the vendor, if the contingency turns out so as to enable him to confer a good title; but to be paid to the purchaser in case the contingency turns out the contrary way. Where instances of this kind most commonly occur in practice, is in the instance of contracts to sell the next presentation of an advowson by a tenant for life or in tail; for as a sale can only be made of interests of this nature during an actual incumbency of the living, the vendor's right of presentation must be contingent on his surviving the incumbent, for if he dies in the lifetime of the latter, his right of presentation would determine with his estate in the property, and a purchaser under him would derive no benefit whatever from his purchase; and hence the plan above suggested of securing a purchaser a return of his purchase moneys, in case of the object of it being defeated in the manner we have just before pointed out: (see a form of this kind, 2 Con. Prec., Part VI., Sect. II., No. VIII., p. 547, 2nd edit.)

As to the apportionment of rents.]—In the case of the purchase of leasehold property held under one lease at one

entire rent, but which is sold in parcels, as the rent cannot be legally apportioned, the purchasers, by way of indemnity, frequently enter into mutual covenants for paying their apportioned parts with mutual powers of distress on breach of such covenants. The proper instrument for this purpose is an indenture, which, after reciting the purchase and assignment of the several leasehold tenements by the respective purchasers parties to the indenture, and of the agreement for the apportionment and indemnity, the several parties mutually covenant to pay their respective portion of the reserved rent, and perform the covenants of the original lease, with a power of distress on breach of the covenants: (see the form 2 Con. Prec., Part III., Sect. V., No. VI., p. 391.)

Indemnities for the apportionment of annuities.]—So where lands charged with an annuity are sold in parcels, the several purchasers frequently enter into a mutual indemnity for the apportionment of the annuity: (see a form of this kind, 4 Jarm. Byth. 198, 3rd edit.) Sometimes, however, it is arranged that the whole amount of the annuity is charged upon one of the lots only; or upon some particular portion of the property: (see a form of this kind, 3 Jarm. Byth. 176, 3rd edit.) The best mode of effecting this object, particularly where there are many purchasers, is to limit the rent-charge to trustees for the benefit of all the purchasers, and thus do away with the necessity of encumbering the land with a distinct rent to each purchaser. An instrument of this kind should recite the conveyance to the several purchasers, and the agreement for indemnity, after which the lands intended to be exclusively charged should be conveyed to the trustees; To hold to them and their heirs to the uses therein after declared, and which should be declared accordingly to be, "To the use and intent" that the trustees may receive thereout an annual sum, equal in amount to the annuity charged on the whole of the property upon the trusts thereinafter declared, to which should be added the usual powers of distress and entry; after which the trust of the rent-charge should be declared to be upon trust to indemnify the purchasers, and in case of their being called upon to pay the rent originally charged then in trust to raise and satisfy the same and all expenses, with a proviso that the grantors shall enjoy the premises charged, subject to the trusts for the indemnity; concluding with a power of appointing new trustees, each party supplying the vacancy in respect of his own trustee: (see the form 3 Jarm. Byth., No. II., p. 181, 3rd edit.)

CHAPTER III.

GUARANTEES.

Guarantees by way of indemnity are usually effected by bond. Indemnities of this kind are generally given for the faithful discharge of the duties of clerks and confidential servants; or for the purpose of securing the value of goods supplied by wholesale dealers to retail traders, or to secure balances of banking accounts; as also for the fulfilment of contracts by builders, engineers, tradesmen or others, who have entered into any undertaking.

Where the guarantee is for the faithful discharge of the duties of a clerk or servant.]—Where the guarantee is for the faithful discharge of the duties of a clerk or servant, the bond is usually entered into by the clerk and his surety, which recites the engagement of the clerk or servant, and that the obligee has required security for the faithful discharge of the clerk's duties with a condition for avoiding the bond in case he discharges his duties accordingly: (see forms of this kind, 2 Con. Prec., Part IX., Nos. II. III. and IV., pp. 582, 584, 586.)

Guarantees for securing the payment for goods, &c.]—The form of guarantee for the payment of goods supplied to traders is by bond with one or more sureties, in which the agreement to supply the principal with goods, upon he and his sureties giving their bond to secure the payment, is to be followed by a condition for avoiding the bond in case such payments are duly made: (see the form, 2 Con. Prec., Part IX., No. I., p. 580, 2nd edit.)

Where the guarantee is to secure the balance of a banking account.]—Bonds by way of guarantee to secure the balance of a banking account may be very concisely penned. They are entered into with one or more sureties, and after reciting

that the sureties have agreed to become bound with the obligor to secure the balance of his running account, the bond is conditioned to be void on his paying his balance accordingly: (see the form 2 Con. Prec., Part IX., No. V., p. 588, 2nd edit.)

Where the guarantee is for the specific performance of a contract by builders, &c.]—Where a guarantee is given for the specific performance of a building contract, or any other undertaking in which labour, skill, and materials are to be employed, two or more sureties are usually required. The nature of the contract ought to be concisely but accurately set out, and it should then be recited that the principal with his sureties have agreed to enter into the bond for the due performance of the contract, concluding with a condition for avoiding the contract if such contract is performed accordingly: (see the form 2 Con. Prec., Part IX., No. VI., p. 590, 2nd edit.)

CHAPTER IV.

ASSURANCE OF TITLE.

The application of the principle of assurance to the security of property and the guarantee of title is of modern invention, but its convenience is so great, its advantages so obvious, that it must, ere long, supersede all other forms of indemnity. The security provided by a wealthy corporation, beyond that which could be given by the bonds or covenants of individuals, is so obvious, that it only needs to be understood to be universally preferred. I have, therefore, thought it to be desirable to introduce into this treatise on the Practice of Conveyancing a sketch of this form of indemnity, with some of the applications which have been already made of it.

The application of the principle of assurance to the security of title, and the facilitating of dealings with real property and the practice of conveyancing, is due to Mr. Cox, the editor of the *Law Times*, who, having first invited discussion of the plan, found it to be so well received, that he formed a company for the purpose of carrying it into practical operation. This company, known by the name of the *Law Property and Life Assurance Society*, has now been six years in existence, and has conducted its operations with entire success. Every branch of this assurance of property, as originally planned, has borne the test of practice, and, as the facilities afforded by it become more widely known, and the applications of it better understood, the business is steadily increasing, and ultimately it must supersede all other less safe and less convenient methods of securing property to purchasers and mortgagees. I propose to describe briefly the various uses to which the principle of assurance has been made applicable in aid of the conveyancer.

1. *Assurance of title.*]—The Society does not, of course, assure titles that are positively *bad*, but only such as are good holding titles, but rendered unmarketable or unmort-

gageable by reason of some defect in evidence, or where the cost of proof is greater than the value of the property will bear. This is effected by a policy of assurance, whereby the company assures the purchaser or mortgagee against any loss by reason of the defect specified. The premium charged varies with the risk, ranging from 5*s.* to 5*l.* per cent., and it is received either in one sum, or by annual premiums, at the option of the assured. The various contingencies to which this form of assurance may be applied, will be best exhibited by some specimens of the defects against which assurances have been actually effected by the company, and for these I am indebted to the courtesy of the intelligent secretary, Mr. Barnes, who is himself a solicitor.

Examples of Assurances of Title effected with the Law Property and Life Assurance Society, 30, Essex-street, Strand.

1.—The assignees of a bankrupt objecting to pay over certain moneys unless released by trustees, who were under certain disabilities, which could not be removed *without considerable expense and delay*, the Society guaranteed the assignees against any possible loss by reason of their paying over the same.

2.—A. died intestate, leaving freehold property, which his widow took possession of and enjoyed for twenty-five years; no heir-at-law could be found. The Society assured the title to a purchaser.

3.—Property was devised to A. and B. A question arose *upon the terms of the will*, whether they took as joint tenants, or tenants in common. A. died intestate. B. continued in possession for more than twenty years. A.'s heir-at-law had made no claim. The Society assured the title to a purchaser from B.

4.—A mortgage deed was lost—no re-assignment had been made, but there was good reason to believe that the mortgage had been paid off—no interest had been demanded or paid for many years. The Society assured against any claim under such mortgage deed.

5.—A. died intestate, leaving freehold property, which his widow took possession of, and devised to B. More than twenty years having elapsed since A.'s death, and thirty years since his heir was heard of, the Society assured B.'s title to a purchaser.

6.—A. B. bequeathed to C. D. one-fourth of the rents arising from a certain estate, to be enjoyed by the said C. D. for life, unless he should at any time be in receipt of an income of 500*l.* per annum or upwards (from other sources), and in such case his interest was to go to his brothers and sister. C. D. being about to borrow a sum of money on mortgage of his life interest in the estate, the mortgagee required a policy from the Society assuring to C. D. his then present income (arising from his share of the estate), during the term of the mortgage.

7.—A. B., having a power of appointment by will over certain estates, became lunatic. C. D., who was his heir-at-law in default of appointment, being about to mortgage a portion of the estate, the mortgagee required to be guaranteed against the probability of A. B. exercising

the power, and for that purpose effected an assurance with the Society. Proof was given to the Society that no appointment had ever been made, and that A. B. was then a confirmed lunatic.

8.—A. B., the owner of a presentation, under a family deed of arrangement, covenanted, without consideration, to present same to C. D. on death of the then incumbent. A. B. subsequently became bankrupt, and his assignees sold the right of presentation to E. F., who proposed to the Society to assure his title thereto against the above covenant.

9.—A. B. (aged about 60) was possessed of a freehold estate, out of which his widow would be entitled to dower; his wife (then about his own age), owing to their not being on terms, refused to join in the conveyance to a purchaser. The Society assured the latter against any claim in respect of dower.

10.—A. B., being entitled to the interest of a large sum of money for life, with an absolute power of appointment in the event of his leaving no issue, or if such issue should not attain the age of 21, was desirous of exercising his power for the purpose of raising a sum of money by way of mortgage, A. B. being at the time nearly 50 years of age, and unmarried. The Society guaranteed the mortgagee against loss by reason of either of the said contingencies.

11.—A. B. was robbed of two bills of exchange drawn by the Commissariat Department of a colony on the Lords Commissioners of the Treasury; he gave notice to the Treasury to stop payment of the bills, which was done, but they declined to pay the amount to A. B. without a guarantee of indemnity. The Society gave the necessary guarantee.

12.—A. B. died intestate, leaving a freehold estate. His eldest son had gone abroad, and had not been heard of for thirty years previous to the death of A. B. The second son took possession of the estate, and held it for twenty years undisputed. The Society assured the title to a purchaser.

13.—A. B. by his will devised certain estates to trustees, subject to certain prior uses, in favour of C. D. and others for life, with power to the said trustees to sell the fee of the said estates, *with the consent of the tenant for life.* The tenant for life (C. D.) sold his life interest, and the trustees afterwards sold the fee. An objection was raised that C. D., having divested himself of his life estate, had no longer the power to authorize the trustees to sell the fee. The Society assured the title.

14.—A. B. was passenger in a ship sailing from Australia, which was supposed to be lost, nothing having been heard of her for three years, and the underwriters having paid the insurance effected on her. Letters of administration were granted to the widow, but on the sale of a portion of his estate, a purchaser objected to the title on the ground that A. B. might still be alive. The Society guaranteed the purchaser against that risk from such contingency.

It will be observed that the contingencies thus assured against are not merely defects in evidence of title, but such as may possibly occur in relationship to the acts of individuals, as marriage, death with or without heirs, survivorship, and so forth.

Where the very slightest doubts exist as to a title, an insurance should always be effected, especially if the mortgagee or purchaser is a trustee. Indeed, it would be prudent if *trustees* were to require it *in every case*, and the cost is so trifling, that it would impose no material burden upon borrowers or sellers.

2. *Assurance of leaseholds and other terminating interests.*]—These are almost worthless as securities, because they have a diminishing value year by year. The *Law Property and Life Assurance Society* cures this defect in such tenures by a policy, which engages to pay the value of the property on the expiration of the interest in it, so that, when the property passes away, its worth in money comes in. By this form of assurance the property becomes of equal value with freehold; indeed, of *greater* value for the purpose of mortgage, for a freehold may fall in value, while a leasehold interest, with a policy, has an unvarying value, to the amount for which it is assured, and hence it becomes readily mortgageable as well as marketable.

3. *Assurance of value.*]—This is not less useful than the other forms of assurance. It is effected thus. The Society issues a policy guaranteeing that, during an agreed period, it will make good any loss the mortgagee may sustain by reason of depreciation in the value of the property, if offered by public auction, or by private sale, if with the Society's consent. To all mortgagees this offers an absolute security. It entirely relieves *trustees* from the serious liabilities to which they are now subject. Such a policy should be insisted upon in every mortgage in which there is a possibility of loss by depreciated value. *Trustees* should *never* dispense with it. The charge of the Society varies according to the character of the property; for some properties it is as low as *5s.* per cent. The following is the scale by which the premiums are usually regulated; but each case will, of course, be subject to special terms.

£		£	£	s.	d.	
500	to	1,000	1	0	0	per cent.
1,000	to	2,500	0	15	0	„
2,500	to	5,000	0	10	0	„
5,000	to	10,000	0	7	6	„
10,000	and upwards		0	5	0	„

Where the amount assured is under £500, the charge will be regulated by the particular circumstances of the case.

BOOK THE SIXTH.

WILLS.

CHAPTER I.

DIRECTIONS FOR TAKING INSTRUCTIONS FOR WILLS.

I. Preliminary Observations.

In the preparation of wills, the chief points to which a professional gentleman should direct his particular attention are—first, to satisfy himself that the intended testator is in a sufficiently sound state of mind to understand the nature of the disposition he is about to make; secondly, to discover what kinds of property the will is intended to comprehend; thirdly, his power of disposal over it; and fourthly, the manner in which he desires this power to be carried into effect. Having obtained all this essential information, the next step will be to reduce the several dispositions into strict technical form, in such a way as effectually to carry out the testator's intention, and prevent, if possible, any doubts or questions from arising at any future period as to

the construction of any part of the will. And, last of all, to see that the will is properly executed by the testator, and attested in due form of law by the proper number of witnesses.

II. Testamentary Capacity.

As to the mental capacity of the testator.]—It is the duty of every person who prepares the will of another to satisfy himself, either by means of his own personal observation, or through the instrumentality of some confidential agent, of the intended testator's mental capacity, as also to ascertain that the will expresses the real intention of a capable testator, who fully understands the nature of every part of its contents, before he allows it to be executed by him as such: (*Rogers* v. *Pittis*, 1 Ad. 46.) It must be confessed, however, that it is sometimes a perplexing question to determine whether a party desirous of making a will really does possess a sufficient degree of mental consciousness to authorize his doing so. Persons whose intellects are in some degree impaired by age, sickness, or infirmity, if they retain sufficient sense to know how to direct the disposal of their property, and to understand what effect such directions, if carried out, would produce, are considered to possess sufficient mental capacity to authorize them to make a will and dispose of the whole of their property accordingly. Even the incapacity of a madman to make a will exists only during the period he is labouring under mental derangement; for when a lucid interval occurs, his testamentary capacity is again restored: (Swin. 72; *Beverley's case*, 4 Rep. 123b; *Kemble* v. *Church*, 3 Hag. 275.) And although an inquisition finding a man a lunatic is *primâ facie* evidence of lunacy during the whole period covered by such inquisition, yet it does not preclude proof that a will was executed, or that some act was done during a lucid interval: (*Hall* v. *Warren*, 9 Ves. 605; *Re Watts*, 1 Curt. 594.) Nor will even the fact of a person being confined in a madhouse necessarily invalidate a will or other instrument executed by him during a lucid interval, if the latter fact can be clearly established. Thus, in a case mentioned by Lord Eldon, in *M'Adam* v. *Walker* (1 Dow. 179), in which his lordship said he had been concerned, where a gentleman who had been some time insane, and was confined in Richmond, made a will, which was of large contents, proportioning the different divisions of his property with the most prudent care, and with a due regard for what he had previously done for the objects of his bounty, and in every

respect pursuant to what he declared before his malady he intended to have done; and it was held that he was of sound mind at the time, and consequently that the will was valid. Nice questions have therefore often arisen, and are still likely to arise, as to what will amount to such an intermission or remission of the disorder as to amount to a lucid interval; a subject upon which it is impossible to lay down any fixed rules, as each particular case must necessarily depend upon its own particular circumstances. It has, indeed, been said, that when the fact of lunacy was once established by clear evidence, the fact that the party is restored to as perfect a state of mind as he previously possessed should be proved by evidence equally clear and satisfactory: (3 Bro. C. C. 444, in a note to *Attorney-General* v. *Parnther.*) But this doctrine is incorrect; for in several modern cases it has been decided that the acts of parties who once laboured under insanity were perfectly valid, notwithstanding they were not restored to quite as perfect a state of mind as that which they had previously enjoyed: (*Niell* v. *Morley*, 9 Ves. 378; *Hall* v. *Warren*, *ib.* 605; *Ex parte Holyland*, 11 Ves. 10; *White* v. *Wilson*, 13 *ib.* 87; *White* v. *Driver*, Phill. 84; *Cartwright* v. *Cartwright*, *ib.* 100.) For the memory which the law considers a sound memory, is where a person has a sufficient understanding to dispose of or manage his property with judgment and discretion, which must be collected from his actions, words, or behaviour at the time. Still, it will not be sufficient to show that a lunatic has done an act which a man in his sound senses might have done, as that may happen in many ways; it must be shown that the act proceeded from judgment and deliberation, otherwise the presumption of lunacy continues. The evidence ought to go to the state and habits of the lunatic, and not rest merely upon an accidental interview with an individual, an occasional instance of self-possession, or his giving a plain answer to a common question: (*Levy* v. *Lindo*, 3 Mer. 85.) It is requisite to show sanity and competence at the time of the act to which the lucid interval refers; for it would be going much too far to infer from circumstances, too trivial in themselves to mark that restoration of mind which is requisite to enable a person to manage his affairs, a conclusion so general, as that a person who has been clearly proved insane has so far recovered the use of his reason as to be capable of performing acts binding upon himself and others. And in a recent case (*Dyce Sombre* v. *Troup*, 26 L. T. Rep. 288), the Prerogative Court held, that where the existence of an insane delusion is once

proved, it is incumbent on the party propounding a testamentary paper to satisfy the court that the delusion had entirely ceased to exist, although there may be nothing on the face of the testamentary document to connect it directly with the delusion.

It should also be ascertained that no undue influence has been used.]—It will be proper, also, to observe here, that it is not at all times sufficient to rest satisfied with the knowledge that the proposed testator possesses sufficient soundness of mind to be able to conduct his affairs; for if it should appear that such an improper dominion or undue influence is exercised over him as to coerce him to act as a mere tool in the hands of others, instead of a free agent, in the disposal of his property, it would be highly improper for any one to assist in carrying out, or acting any part in, so nefarious a transaction. And in all cases where a professional gentleman receives any instructions for a will from any party who is not the proposed testator himself, *à fortiori* where such instructions are given by an interested party, he should satisfy himself, by some sure and certain means or other, that the testator thoroughly understands the nature of the dispositions he has made, before the will itself is handed over to him for his execution.

III. PROPERTY TO BE DISPOSED OF.

Particular nature of the property should be ascertained.]—With respect to the property intended to be disposed of, it will be necessary to ascertain of what it consists, with its particular nature and qualities, and all the other incidents belonging to it. If such property consists of lands, it should be discovered whether they be freehold, leasehold, or of copyhold or customary tenure, and if of the latter description, whether they have been surrendered to the use of the testator's will. It should also be ascertained whether he holds any lands as a trustee, or by way of mortgage, and if he does, he should be asked whether he intends to make any specific disposition of this property, or intends it to devolve upon his representatives in their representative character. If the lands intended to be devised are subject to mortgages, or any incumbrances, it should be inquired whether the devisee is to take onerated or discharged from the burthen. In case, also, the intended subject-matter of devise consists of lands contracted for, but not actually conveyed, and either the whole or any part of the purchase-

money remains undischarged, the testator ought to be asked out of what funds such purchase-money is to be paid; and whether, in case the contract should happen to be rescinded for defect of title in the vendor, or any other cause, the devisee is to be entitled to the benefit of the purchase money.

IV. Power of Disposition.

As to the testator's power of disposition over the property.] —It will also be essential to ascertain what estate or interest the testator takes in the property, for the purpose of finding out whether he possesses an absolute and uncontrollable power of disposition over it; or if, as sometimes happens, the power of disposition is derived under a power of appointment. If the latter, it must be discovered whether such power is a general one, authorizing an appointment to any person the testator may think proper to select; or whether such power is not restricted to be exercised in favour of some particular objects. Inquiry should also be made as to whether the intended testator derives his ownership of the property under any settlement; and if so it should be clearly shown what estate and interest he really takes under such settlement, otherwise it will be impossible to say whether or not he has any power of testamentary disposition over the property, or whether some previous acts on his part may not be necessary before he can acquire such power; as for instance, where he is a tenant in tail, in which case, as long as his estate tail exists, he has no testamentary power of disposition whatever, and a will made by him under such circumstances would be a mere nullity. And whereever there is an existing protector to a settlement, the tenant in tail can, by barring his entail, create only a base fee determinable on failure of his issue, unless the protector consents to the disentailing assurance, which it is perfectly optional with him either to give or to withhold, as no court of law or equity have the slightest power or control over him in this respect (stat. 3 & 4 Will. 4, c. 74, s. 37), and in all cases where an entail has been barred, it will be necessary to discover that this has been done by such an assurance as will not only bar the estate tail of the tenant in tail, but also all estates in remainder or reversion expectant thereon; for where an entail has been barred by a mode of assurance that has been insufficient to bar the remainders over, as a fine, for instance, under the old system, which like disentailing

assurances in the case of a protected settlement without the consent of the protector at the present day, could only create a base fee, determinable on failure of issue of the tenant in tail; so that if he had no issue at the time of his decease, the devise would be altogether inoperative; and even if he left issue, it would be determinable on failure of such issue.

V. Intended Mode of Disposition.

As to the intended mode of disposing of the property.]—The carrying out the testator's intention with respect to the disposition of his property is often one of the most puzzling tasks a solicitor can be called upon to perform. It is, in fact, oftentimes difficult to ascertain what a testator's intention really is; many persons who have occasion to make their wills are altogether unacquainted with the different natures and qualities of the property they may intend to dispose of, as well as ignorant of the most common and ordinary modes of disposition; and even when the intention is discovered, it is often impossible to carry it out in accordance with a testator's wishes, which are often contrary to some fixed rule of law: as in the case of devises of lands or things savouring of the realty to charitable uses, or attempting to tie up property, so as to render it inalienable, or directing the accumulation of funds for a longer period than the law allows. Under such circumstances the best thing to be done is to carry out the testator's views as far as the circumstances will permit, and thus partially, if not effectually, to effect the testator's object. But the adjustment of such matters, difficult at all times, is often rendered still more so when the important duty of making a will has been delayed until the party is suffering from sickness and debility, and not unfrequently until he is actually upon his death-bed.

Where the instructions are taken through the medium of a third person.]—Another difficulty which sometimes occurs in practice is where the instructions to the party drawing the will are not given to him direct from the testator, but through the medium of a third party, from which a will is to be drawn up and prepared and ready for execution without any instructions from the testator himself, or any direct communication whatever from him upon the subject. Whenever this occurs, it throws the responsibility upon the party

preparing the will the responsibility of discovering, by some sufficient means or other, the intended testator's supposed volition or capacity before he undertakes the preparation of the instrument: (*Rogers* v. *Pittis*, 1 Ad. 46.)

Where the testator is in trade.]—If the intended testator is in trade, it will be important to ascertain in what way he intends to dispose of it; and if he intends it should still be carried on, the manner in which he wishes the business to be conducted, and what persons are to have the control or management of it. In cases of this kind it may often be advisable to offer some suggestions, if the testator himself does not allude to the subject, as to whether the persons who are to have the conduct of the concern should not be authorized to increase, diminish, or discontinue the same, in case it should be likely to prove a losing affair. This must often prove a most important provision; for no business, however lucrative at any certain period, can be certain to continue so for any great length of time; and many an undertaking which may be highly profitable at one time, may, from numberless unforeseen events, very soon turn out very unprofitable; so much, indeed, that to carry it on for any lengthened period would not only be unprofitable, but even productive of ruinous consequences. Another and perhaps rather a delicate question may sometimes become a necessary duty, and this is, where a testator designs his widow to take any part in the management of his business, to inquire of him whether, in case she marries again, her future husband is to have any power to interfere in the concern, or whether, to prevent his possible interference, all right of the widow as to such management is not to cease altogether upon her future marriage. In a case so circumstanced, it is most probable the testator himself would, should the thought occur to him, give all these directions, but should he fail to do so, his attention certainly ought to be directed to the subject, and this the more particularly where there are any children, or other relatives of the testator, who are at any time intended to take any part in, or derive any benefit from, the business; otherwise, by the widow's future marriage, the whole concern may be deteriorated or ruined by the interference and ill management of the aftertaken husband. If the testator intends any members of his family, or any other persons, to be admitted into the business, the terms upon which such admission is to be obtained must be clearly ascertained from him, otherwise it will be impossible to

set them out clearly in the will. Instances of this kind most frequently occur where a testator is desirous that some one of his children, probably a minor, or under a course of apprenticeship, should, when legally capable, be admitted into the business; when this happens it will always be advisable to ask the testator whether, in case the intended son should die, decline to enter into the business, or for any other cause the arrangement cannot be carried out, how the business is to be then disposed of; and whether, in case the son declines, any other provision is to be made for him; whether any other son, or any other person, is to have the option of being admitted into the concern; and also the terms and conditions upon which such admission is to be obtained.

Where the persons to be benefited are in trade.]—If any of the parties intended to be benefited by the will are in trade, the testator should always be asked whether or not their interests are to cease in the event of their bankruptcy or insolvency, and if they are so to cease, in what way he would wish the property to be then disposed of.

As to charges on the real estate.]—If the testator intends to charge his real estate with the payment of debts or legacies, or any other charges to which his real estate is not otherwise liable, he should be asked whether he intends the charge to extend to the whole, or only to a part of such property; and whether his real estate is to be primarily liable, or only to be charged in aid of the personal estate; and whether the surplus is to be considered as real or personal property; as also what persons are to be entitled to the benefit of such surplus.

Where the property is to be sold after the death of a party to whom it is devised for life.]—It sometimes happens that a testator wishes to devise real estate to a person for life, and that the property should be sold after his decease; in such a case it will be proper always to ask the testator whether such property is under any circumstances to be sold as a reversionary interest during the life estate (which, however, is very seldom the testator's intention), or whether it may not be sold with the concurrence of the tenant for life, to take effect in possession; and it should also of course be ascertained in what manner the testator may wish the produce of the sale to be disposed of.

As to debarring the devisee's widow of her right of dower.] —If any proposed devisee of an estate of inheritance, upon which a right of dower would attach, was married previously to the year 1834, it will be proper to inquire whether the testator intends the widow of such devisee to be debarred of her right of dower, or otherwise.

Where the same property is given amongst several persons.] —Where the same property is designed to be given amongst several persons, it should be ascertained what particular portion each is intended to take; and if they are to take in equal portions, it should be inquired whether they are to take as joint tenants, or as tenants in common, and if as the latter, whether, on the decease of any of them, the surviving or accrued shares are to go to the survivors; as also to what period the survivorship is to be referred.

As to estates tail.]—If the testator expresses a desire that his devisees shall take estates tail, it should always be inquired whether by entailed estates he does not mean a strict settlement, and if so, whether the persons taking life estates under it are to be empowered to make jointures, raise portions for children, cut down timber, grant leases, enfranchise copyholds, &c.; also whether the trustees under the settlement are to be invested with a power of partition, sale, or exchange; and if the lands are subject to any incumbrances, whether the trustees are to be invested with a power of sale over all or any portion of the property for the purpose of discharging them; and if so, whether any particular parts of the settled property are to be first applied for that purpose. It will be requisite also to inquire of the testator whether he intends the estates tail to be general or special; whether in tail male only, or whether females are to be included to participate in the benefit of the settlement; and if so, whether they are to take in remainder one after another, or as tenants in common, and if in the latter character, whether cross remainders are to be limited between them.

As to shifting clauses.]—In case the testator desires that any of the settled estates shall shift from one party to another upon the happening of any contingent event, it should be particularly ascertained whether, on those events taking place, all or any appointments made in pursuance of any powers of appointment reserved to the person from

set them out clearly in the will. Instances of this kind most frequently occur where a testator is desirous that some one of his children, probably a minor, or under a course of apprenticeship, should, when legally capable, be admitted into the business; when this happens it will always be advisable to ask the testator whether, in case the intended son should die, decline to enter into the business, or for any other cause the arrangement cannot be carried out, how the business is to be then disposed of; and whether, in case the son declines, any other provision is to be made for him; whether any other son, or any other person, is to have the option of being admitted into the concern; and also the terms and conditions upon which such admission is to be obtained.

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As to shifting clauses.]—In case the testator desires that any of the settled estates shall shift from one party to another upon the happening of any contingent event, it should be particularly ascertained whether, on those events taking place, all or any appointments made in pursuance of any powers of appointment reserved to the person from

whom the estate is to shift, shall become void or remain in force.

Where any portion of the settled estates consists of leasehold or other chattel property.]—If any part of the settled property consists of leasehold estates held for a term of years (the latter of which cannot be limited in strict settlement to the extent of freehold estates, because the first person who would take an estate tail in the instance of freeholds would acquire an absolute interest in the term, which then becomes transmissible accordingly, and devolves upon his personal representatives, instead of descending upon the heirs of his body) it will be prudent to ask the testator whether or not the trustees of the settlement are to be authorized to sell the leaseholds, and purchase freeholds to be settled to the uses of the settlement.

As to heirlooms.]—Where there is any old family plate, pictures, jewels, or furniture of any description, which have generally gone with the estate, it is advisable to inquire whether any of these are designed to go as heirlooms accordingly; and, if so, whether the trustees are to be empowered to sell any of them and supply others in their place; and whether, in case the property to which they are annexed should at any time be sold or exchanged under any of the powers contained in the will, the heirlooms are to be preserved.

As to estates upon condition, or dependent upon the happening of some contingent event.]—If the testator wishes to annex any condition to any intended devise or bequest, or the gift is to be dependent upon the happening of some contingent event, it will be necessary not only to ascertain the testator's intent with respect to the precise terms of such condition or contingency, but also to see whether such condition or contingency may be legally carried out, and is neither void for remoteness, or from being contrary to public policy, or repugnant to the nature of the bequest. Another important question to ask, where an estate is to depend upon the happening of some contingent event, is, what is to be the destination of the profits in the meantime; and when any trusts for accumulation are directed, care must be taken to see that they do not exceed the limits which the law allows, as also to understand to what extent such trusts may be legally carried out.

As to legacies.]—In taking instructions for legacies, it will be requisite to ascertain from the testator—1. Whether he intends them to be general or specific; 2. Whether they are to be vested or contingent; 3. Whether a legacy lapsing by the death of a legatee before the time of its vesting shall go to his representatives, or vest in another person, or sink into the residue; 4. Whether the testator in disposing of such legacy does not overlook the possibility of the legatee's having children before the time of its vesting; 5. What is to become of the intermediate profits before the time of its vesting; 6. Whether such legacy is intended as a satisfaction of any debt or duty which a testator is bound either to pay or to perform; 7. Whether on a deficiency of assets any of the legatees are to be entitled to a preference; 8. Whether a bequest to a debtor is intended as a release of his debt; 9. If a testator wishes to bequeath a legacy to a person by a codicil, it will always be advisable to inquire whether the same person has already a legacy bequeathed to him by the will; and if so, it must then be ascertained whether the last legacy is intended to be in substitution of a former one, or accumulative; 10. It must be asked what persons are to be appointed as the executors, and whether they are to take beneficially under the will; 11. What persons are to be beneficially entitled to the residue. In addition to these inquiries it will be necessary to ascertain from the testator whether he intends the legatees to take absolute, conditional, or limited interests in their several legacies; whether legacies bequeathed to married women are to be limited to their separate use, and if so, whether they are to have a power of appointment, and if so, in whose favour, or to what extent such power of appointment is to be exercised.

As to portions for children.]—With respect to portions for children, the inquiry seems to be—1. To ascertain what particular property is to be burdened with the charge; 2. To discover at what particular age or time the testator intends the shares to become vested interests; 3. Whether before the time of vesting, the whole income, or any portion of it, is to be applied for maintenance, education, or advancement in life, and what is to become of the surplus, and whether any part of the principal may be so applied, and so, how much; 4. Whether, if more than one of them should die without having acquired a vested interest in his share, both the original and accruing shares shall survive to the other children; 5. Whether, if any of the children die leaving children or other issue, without having acquired a vested

interest in their shares, such share shall survive to the others, or their children or issue shall be substituted in their place; 6. When any person is to be invested with a power of appointing a fund or a provision for children, either amongst them all, or in favour of one or more to the exclusion of the rest, it should be ascertained whether the children are to have the fund, if no appointment should be made; 7. Whether it is designed that legacies to children should be satisfied by subsequent portions given to them on either their marriage, or for their advancement in life; 8. It occasionally happens that a testator is desirous of making a disposition of his property in favour of his wife and children, by giving the wife the income or profits during her lifetime or widowhood (but more frequently restricting her interest to the latter period only), and the capital to go to her children on her decease or future marriage. In a case so circumstanced, it will always be prudent to inquire whether the widow's life interest is to be clothed with any trust for maintenance and education of the children; and also whether she is to have the power of increasing the shares of some of them, to the exclusion of the others.

CHAPTER II.

GENERAL INTRODUCTORY OUTLINE OF THE PRINCIPAL POINTS TO BE ATTENDED TO IN MAKING A WILL.

It was formerly the practice to commence a will with a long introductory preamble, setting out the state of mind and body of the testator, with a profession of his faith in the Christian religion; and then, after committing his soul to his Maker and his body to be buried, he expressed his intention to dispose of his worldly possessions. This formal, but superfluous commencement gradually grew into disuse, and although occasionally found in wills penned by ignorant persons, is rarely, if ever, met with in those prepared by professional men, who are content to confine the instrument to the object it is really intended to accomplish. A will at the present day, therefore, usually commences that it is the last and only will of the testator, setting out his Christian and surname, place of residence, and occupation in life. Some gentlemen have, however, adopted the plan of commencing with a clause revoking all former wills, instead of placing that clause at the end of the instrument, as was formerly the common, and in fact is still the most usual, practice; but unless it be upon the ground of guarding against the possibility of the clause being overlooked or forgotten to be inserted in its usual place at the end, there appears to be no reason for thus reversing the pre-existing order of arrangement. It appears, also, that the mere insertion of the word "only," as in the form of clause above suggested (see the same form, 2 Con. Prec., Part VII., No. I., clause 1, p. 632, 2nd edit.), will have the same force and operation as an express clause of revocation, and has been introduced into most, if not all, the forms of modern precedents of wills. And the plan which has been sometimes adopted in penning wills at the present day is to make the appointment of the executors at the commencement instead of the end of the will, but the latter has been, and still seems

to be, the more usual practice, although it is quite immaterial whether it be made either in the beginning or at the end, or in any other part of the will, provided the appointment be made in sufficient terms to denote the testator's intention to make it.

Difficulty of laying down any fixed rules as to the arrangement of the various clauses.]—With respect to the order of the other clauses in the will, their arrangement must necessarily depend upon the nature of the property and the particular way in which the testator intends to dispose of it, so that every case must depend so much upon its own individual circumstances, that it is impossible to lay down any fixed rules upon the subject.

Principal points to be attended to in making a will.]—The chief points to be attended to are—FIRST, describe the parties intended to take under the will with sufficient clearness to leave no doubt as to their identity. SECONDLY, to set out the property with such accuracy as to prevent the possibility of any questions arising as to whether or not it was the identical property which the testator designed to pass. And THIRDLY, so to limit the estates, interests, powers, and restrictions to be given or imposed by the will, as well as any trusts or charges the testator may wish to create, by such proper, apt, and technical expressions as are best adapted to the purpose, and thus, if possible, prevent any question from arising at a future period as to their true legal construction, which may afford cause for either litigation or dispute.

CHAPTER III.

DESCRIPTION OF THE PARTIES WHO ARE TO TAKE UNDER THE WILL.

Importance of describing the parties intended to take under the will in an accurate manner.]—Every devisee or legatee must be properly ascertained, either by nomination, as by the Christian and surname, or by some other description that will point out with certainty who is the party actually intended by it; for if a will gives so vague a description of the person who is to take, that it cannot be determined who was the person the testator really intended, the gift must fail for uncertainty; as if, for example, a testator was to devise to the son of A., who had several sons, without mentioning the name of any one individual of them, or distinguishing any one from the rest by the order or priority of his birth, as the eldest, second, or so forth, the devise would fail of effect altogether; because it would be impossible, from so loose a description, to discover which particular son it was who was to be benefited by the gift. But if A. had only had one son, then the description would be sufficient; for in such case there could be no uncertainty who the testator intended it should apply to. So, where a bequest was made to the son and daughter of A. (A. having four sons and one daughter), it was held, that although the bequest to the son was void for uncertainty, the bequest to the daughter was good; because there being only one daughter, she was sufficiently described, and therefore there was no uncertainty as to her; and the legacy being limited in joint tenancy, it was determined that she should take the entirety, as being alone capable of taking under the description: (*Dowset* v. *Sweet*, Amb. 175.)

How the parties ought to be described.]—In penning wills, therefore, the devisees should be described by their proper

Christian and surnames, and the party who prepares the will should try to ascertain whether any of them have more than one Christian name, and if so, to adapt the description accordingly, as it has sometimes occurred that another person has taken instead of the one actually intended, by means of a description being more applicable to him than the latter; as, where a bequest has been made by a testator to his nephew, John Smith, who has two nephews, one called John Smith, and the other John Thomas Smith, and he intended the latter to take, but described him as John Smith only; or, where a father and son are both of the same name, and the son is intended to take, but the description, "younger," is omitted to be added to the name of the son.

Where both are of the same name.]—So, when the description is equally applicable to the one as the other, the bequest will fail equally as to both, unless it can be shown by parol evidence which was the party the testator actually intended to take; for evidence of this kind is admissible to explain a latent ambiguity (*Doe d. Morgan* v. *Morgan*, 1 Cromp. & Mees. 235); although it cannot be received where the ambiguity is a patent one. Still, if the evidence falls short of proving which person the testator actually designed to give the property to, neither party will be allowed to take, although they may agree between themselves that they shall divide the property between them, or one will consent to resign his entire claim to the other. And although parol evidence has been admitted to show what person the testator really intended where a mistake has been made in the Christian name (*Beaumont* v. *Fell*, 1 P. Wms.; *Bradshaw* v. *Bradshaw*, 2 You. & Coll. 72), the court has refused to substitute one person in the place of another to whom such description is more strictly applicable: (*Hampshire* v. *Pierce*, 2 Ves. sen. 218: *Doe* v. *Westlake*, 4 B. & Ald. 57.) As in the case of *The Goods of George Collins* (14 L. T. Rep. 295), the Christian name of a legatee had been wrongly written in a will, which arose in consequence of the testator, who, at the time he gave the instructions to his solicitor, was very ill, naming "John," a person who had been dead for some years, instead of "William," as a legatee; and the solicitor so drew the draft, but on reading it over to the testator, the latter discovered and pointed out the error, and directed the solicitor to alter the name accordingly; but the testator being *in extremis*, the alteration was forgotten to be made, and the will was executed by him with the name of John still appearing instead of William; the court held that it had no power to

alter the will. Still, if a devisee is so described as to distinguish him from every other person, the inaptitude of some of the particulars will be immaterial (*Attorney-General* v. *Corporation of Rye*, 7 Taunt. 546; 1 Jarm. on Wills, 330); hence, where a devise was to the eldest son of a party, but there was an error in his Christian name, the term "eldest son" was held sufficient to point him out with certainty: (*Doe d. Cook* v. *Danvers*, 7 East, 299.) Yet, in cases of this kind, wherever, as we have just before remarked, the description applies more to one person than another, the court will not permit the person to whom the description is less applicable to be preferred; and where the description applies partly to one person, and partly to another, the gift must necessarily fail for uncertainty (*Doe* v. *Uthwaite*, 3 B. & Ald. 632), unless the ambiguity thus arising can be removed by parol evidence, which, as we have already noticed, is always admissible in cases of this kind. But extrinsic evidence will in no instance be admitted to supply a name, where a total blank is left in a will; and in a case where a bequest was to Lady H. it was considered as equivalent to a total blank, and therefore that it could not be supplied by parol evidence, notwithstanding there were strong circumstances in the will to show that Lady Hort was the person actually intended: (*Hunt* v. *Hort*, 3 Bro. C. C. 311.)

As to bequests to children.]—In bequests to children, in that character, it should be first ascertained whether the testator intends to include future born children, as well as those already in existence; as also whether he intends to confine the objects to such children as shall be living at the time of his death, or to extend his bounty to such as shall be living at the time the fund is to be distributed; and whether, in case any of such children should die before the period of distribution arrives, their shares are to be transmissible to their representatives; and when the testator's real intention is discovered, every care must be taken to pen the will accordingly. Want of due attention in this respect has proved a fertile source of litigation, and many nice points and questions have consequently arisen upon the subject.

Where bequest will only embrace objects in existence at the time of the testator's decease.]—The doctrine which has been established by the various cases, however, appears to be, that where there is an immediate bequest to children as a class, so as to vest the possession in them at the time of the testator's

decease, such children as are in existence at that period, and such only, will be comprehended under that description: (*Garbard* v. *Mayot*, 2 Vern. 105; *Davidson* v. *Dallas*, 14 Ves. 579.)

When the gift will include children in existence at the time of the distribution of the property.]—But where the distribution of the fund is postponed until some future period: as after the death of some person taking a previous life interest therein; or where any particular estate or interest is carved out of it, then all such children as shall be in existence at the time the division takes place will be entitled. In the latter case, therefore, the children living at the testator's death take an immediate vested interest in the fund, which will be transmissible to their representatives, although they should die before the time of distribution arrives (*Middleton* v. *Messenger*, 5 Ves. 136); and a child *in ventre sa mere* at the time of distribution will be entitled to share in the same manner as if then actually born (*Whitelock* v. *Heddon*, 1 Bos. & Pull. 243); subject to be devested *pro tanto* as the number of objects is augmented by future children being born prior to the time of division: (*Walton* v. *Shore*, 15 Ves. 122.) But children born subsequently will be excluded: (*Godfrey* v. *Davis*, 6 Ves. 49.) And notwithstanding there should be only one person answering the description, that person will be entitled to the whole, to the exclusion of all those who may subsequently come into existence: (*Martin* v. *Wilson*, 3 Bro. C. C. 324.)

Where the period of distribution is on the attainment of some given age.]—So, also, where the period of distribution is on the attainment of a given age by the children, the gift will be confined to those only who come into existence before the first child attains that age (that is to say), the period at which the fund becomes distributable in respect of any single object. Thus, suppose a legacy to be given to the children, or to all of the children of A. B., to be payable at twenty-one, or to A. for life, and after his decease to the children of C. D., payable at twenty-one, if any child in the former case, at the death of the testator, and in the latter, at the death of A. B., has attained twenty-one, so that his or her share would be immediately payable, no subsequently born children will take; yet if, at the period of such death, no child shall have attained twenty-one, then all the children who shall subsequently come into existence before that one shall attain that age, will be entitled; but all born sub-

sequently will be excluded: (*Whitbread* v. *Lord St. John*, 10 Ves. 152; *Mathews* v. *Paul*, 3 Swanst. 328.)

Where marriage is the event upon which the gift is to vest.] —In like manner, where marriage is named as the event upon which the gift is to vest in possession, the first marriage that takes place will be the period for fixing the class of children who are to take: (2 Jarm. Wills, 81.)

Gifts to children born or to be born, begotten, &c.]—A bequest to the children of a particular person, "born or to be born," or "to be begotten," is immediate as to the children living at the time of the testator's death, and all who may be born during the lifetime of that person; because the objects of the testator's bounty cannot be ascertained until the termination of the latter period: (*Mogg* v. *Mogg*, 1 Mer. 658.) Nor will a bequest to children "hereafter to be born" exclude children born previously (*Hebblethwaite* v. *Cartwright*, Cas. temp. Talb. 131), and it has also been decided that the description of children "born or living," will include a child *in ventre sa mere*: (*Whitelock* v. *Haddon*, 1 Bos. & Pull. 243.) But where a certain period is marked out at which time the distribution is to be made, children born after that time will be excluded; as in *Whitbread* v. *Lord St. John* (10 Ves. 152), where the bequest was unto and among the child and children of A. born, or to be born, when and as they should attain the age of twenty-one, or be married with consent; in which case Lord Eldon confined the bequest to children *in esse* when the first share vested in possession: (see also *Paul* v. *Compton*, 6 Ves. 375.) There is also an important exception to the rule that where the distribution is postponed, it will let in all such children as come into existence until that time arrives. This is, where, instead of a bequest of a particular fund amongst the children, a gross sum, as a legacy of 100*l*., is given to each, and made payable at some stated age (as twenty-one for instance); in which case the bequest would be confined to such children only as were in existence at the time of the testator's death, on account of the inconvenience of postponing the distribution of the general personal estate until the eldest legatee becomes of age, which would be the inevitable effect of keeping open the number of pecuniary legatees: (*Storrs* v. *Benbow*, 2 Myl. & Kee. 46); an argument that does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount: (*Gilmore* v. *Levern*, 1 Bro. C. C. 582.)

Where the bequest is immediate, the circumstance of the fund being subjected to trusts for particular purposes will not let in objects born in the interval.]—It must also be observed that where the bequest is immediate, so as to vest in the legatees immediately, the circumstance of the fund being subjected to trusts for particular purposes, as to raise money for the payment of debts, annuities, or the like, by which means the time of distribution may be delayed, and perhaps postponed to some distant period, will not let in objects born in the interval of the testator's death and time of division; for, notwithstanding the fund being charged with the trusts which may delay the division of it, the time of its vesting is not thereby postponed: (*Singleton* v. *Gilbert*, 1 Bro. C. C. 54, n. *a*.)

When the gift may be confined to such children only as are living at the time of the will.]—A bequest may, by express words, or by inference, be confined to such children only as shall be living at the time of the will; as to the children of A., setting out the names of the children; or to the six children of A., who has that precise number, in either of which cases after-born children will be excluded: (*Sherard* v. *Bishop*, 4 Bro. C. C. 55.) But where a bequest is made amongst a specified number of children of a person who had either a greater (*Garvey* v. *Hibbert*, 19 Ves. 125), or a lesser number of children at the time the will was made (*Harrison* v. *Harrison*, 1 Russ. & Myl. 72), the testator will be presumed to have been mistaken as to the actual number of the children, and that his real intention was, that all the children, whatever the number might be that were in existence at the time he made his will, should be included; for if any other construction were to be adopted, the bequest would be void for uncertainty, from the impossibility, as we have already noticed, of distinguishing which of the children were intended to be included in the first instance, and which were to be excluded in the other. Upon the same principle, also, where a testator bequeathed the residue of his personal estate to be divided between his seven children, A. B. C. D. E. and F. (mentioning six only), whereas, in fact, he had eight children at the time he made his will, but it appearing from other parts of the will that the testator considered one of his children as fully provided for, the seven other children were entitled.

When parties are to take per capita or per stirpes, the will must be prepared accordingly.]—If a bequest is to be made

to the children of different individuals, it should be stated whether they are to take *per stirpes* or *per capita;* for if the bequest is to the children of A. and B. they will take *per capita;* so that if A. has only one child, and B. several children, the child of A. will be entitled only to a share equal to one of the children of B. (*Luger* v. *Harmer*, 1 Cox, 250), and the construction will be the same where the bequest is made to A. and the children of B.; and in such case A. will only take a share equal to one of the children of B.: (*Walker* v. *Moore*, 1 Beav. 607.) It may be proper here to remark, that a bequest to A. and B.'s children, or to my brother and sister's children, will be read as a gift to A. and the children of B., or to the brother and children of the sister, as it strictly and properly imports, and not to the children of both, as the expression is sometimes used, inaccurately, to signify: (*Doe d. Hayter* v. *Joinville*, 3 East, 172.)

As to bequests to younger children.]—When a bequest is amongst younger children, the will ought clearly to express what are to be so considered; and also whether one becoming an elder child before the time of distribution is to take, or be excluded. In bequests of this kind there is a difference in the construction, whether the gift proceeds from a parent, or person standing *in loco parentis*, and where it proceeds from a party who does not stand in either of those relations. In the former case, the term "younger children" is considered to be properly applicable to those branches who are excluded by the laws of primogeniture or otherwise from taking the family estate; for when so excluded the term has been held to apply to all the children who do not take the estate, whether younger or not, to the exclusion of the child who does take it, whether elder or not: (*Butler* v. *Duncombe*, 1 P. Wms. 451.) Hence, if a parent who has an absolute power of appointment over the inheritance, subject to a term of years for raising portions for younger children, was to appoint the estate to a younger son, the eldest son would be entitled to a portion under the trusts of the term, and the younger son who takes under the appointment would be excluded: (*Dale* v. *Doidg*, 2 Ves. sen. 203.) But this rule holds only where the portions are for younger children; for where the portions are to be raised for children generally, an eldest child will be permitted to participate with the rest: (*Incledon* v. *Northcote*, 3 Atk. 438.)

Eldest daughter, when considered as a younger child.]—The rule above laid down does not extend to a daughter,

although an eldest child, upon the principle that, in point of law, he who takes the family estate is the eldest child: (*Northy* v. *Strange*, *sup.*) Neither is it applicable to any gifts but those proceeding from a parent, or a person standing *in loco parentis;* for when the disposition proceeds from strangers, the rule is much the same as that we have just before been treating of, where a bequest is made to children generally as a class, and will consequently become vested interests in such persons as answer the description of younger children, either at the testator's death, or at such other period as is pointed out for the ascertainment of the objects and division of the fund, to the exclusion of such children as are born afterwards: (*Loder* v. *Loder*, 2 Ves. sen. 532.) The circumstance of a younger son becoming an elder son before the time of distribution will not generally exclude him (*Coleman* v. *Seymour*, cited, Amb. 349); and therefore if it is intended that he should be excluded, it ought to be so stated in the will. But it will be otherwise, if the time of distribution is appointed to take place when the eldest son shall attain twenty-one; for the eldest son does not then answer the description of a younger child (*Hall* v. *Hewer*, Amb. 204; *Bowles* v. *Bowles*, 10 Ves. 177), for where there is a gift to the elder son in terms which would carry it to the eldest son for the time being, and there is another gift in the same will to the younger children generally, a younger child who afterwards becomes an eldest child will be excluded, as not falling within the latter description: (2 Jarm. on Wills, 125.) But if there is an express limitation over, in case a younger child should become an eldest, before some stated age or time, this, it seems, would prevent his being excluded in the event of his becoming an eldest son after such stated age or period, upon the principle *exclusio unius est inclusio alterius:* (*Windham* v. *Graham*, 1 Russ. 331.)

Construction of bequest to youngest or to eldest child.]—A bequest to the youngest child of A. has been held to vest in an only child (*Emery* v. *England*, 3 Ves. 232); and by the same rule, a bequest to the eldest child would be applicable to an only child.

As to bequests to illegitimate children.]—In cases of bequests to illegitimate children, still greater caution will be required than where they are legitimate; because the term children is strictly applicable to legitimate children only; so that under a bequest to the children of A. B., who has both legitimate and illegitimate children, only the legitimate

children would be entitled, notwithstanding they may be all born of the same father and mother, and brought up and treated without any distinction between them as members of the same family: (*Bagley* v. *Mollard*, 1 Russ. & Myl. 581.) But although illegitimate children cannot, strictly speaking, take under the description of children, still that term being applied to them will not prevent their taking if they are so described in other respects as to leave no doubt as to their being the identical parties intended; as where a testator bequeaths a sum of money to his son John, or his granddaughter Mary, and he has no child or grandchild bearing those names, except such as are illegitimate (*Rivers' case*, 1 Atk. 410); for illegitimate children born at the time of the making of the will may take under any description that is sufficient to identify them: (*Metham* v. *Duke of Devon*, 1 P. Wms. 529.) And therefore if the gift is to the children "now living" of a person who has only illegitimate children at the date of the will, they will be entitled to take under that description (*Blundell* v. *Dunn*, cited, 1 Madd. 433), and the construction will be the same where a bequest is made to the children of a deceased person, who has left illegitimate, but no legitimate, children: (*Gill* v. *Shelley*, Rolls, 28 Jan. 1831, stated; Wigram on Ambiguities in Wills, p. 31, 2nd edit.) And although illegitimate children cannot take as under the same description, or as belonging to the same class as legitimate children, they may nevertheless take under a *designatio personarum* applicable to both; as for example, where a testator who has four children then living, two of each kind, gives to his four children *now living*. Still, for all this it will never be safe for a testator to describe his natural children in the same terms as if they were legitimate, that is where he describes them as his own, even though he mentions them as the children of the mother also; because, when a man, whether married or unmarried, gives to his children by a particular woman, who is not his wife, the rule is that he will be presumed to mean legitimate children, unless he makes use of such words as plainly demonstrate a contrary intention: (*Kenebel* v. *Scrafton*, 2 East, 550.) But if the testator was to add that his children by the particular woman, although not his wife, should take, whether legitimate or illegitimate, the gift would doubtless include illegitimate children also: (*Bailey* v. *Snelham*, 1 Sim. & Stu. 78.)

Construction where the dispositions of the will show the testator does not contemplate marriage.]—And where the dis-

positions of the will show that the testator does not contemplate marriage. Thus, where a married man, having children by A. L., devised to his wife for life a certain mansion house, and after her decease to A. L., provided she continue single and unmarried; and, subject thereto, he devised the whole of his estate (after limiting a term thereout, in trust for the children which he might have of the said A. L., share and share alike, and to her and their heirs for ever, and in default of such child or children over, he bequeathed to A. L. an annuity for the management and guardianship of each of the children; by a codicil (but which being unattested was inoperative to effect the construction of the devise) the testator declared that his meaning was to include three children of the said A. L., naming them. Lord Eldon, assisted by Thompson, Baron, and Le Blanc and Gibbs, Justices, held that it was impossible the testator, a married man with a wife who he thought would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean anything but illegitimate children, and that his illegitimate children were entitled accordingly.

As to future born illegitimate children.]—With respect to future born illegitimate children, it appears formerly to have been held that a bastard born after the will was made could not possibly take under any description contained therein; the reason alleged was, that a bastard cannot take until he has acquired a name by reputation, and that reputation cannot be gained before the child is born; and consequently, that a gift to a bastard *in ventre sa mere* could have had no operation. The latter doctrine, however, is only applicable where a gift to a bastard *in ventre sa mere* is made with reference to the father only, on account of the uncertainty (a bastard being considered, in respect of his paternal parent at least, *nullus filius*); but there is no uncertainty whatever as far as the mother is concerned, and therefore, if the reference is made to her only, the fact of birth, which can easily be ascertained, will establish the bastard's title to the gift: (*Earl* v. *Wilson*, 17 Ves. 528; *Arnold* v. *Preston*, 18 *ib.* 288.)

As to gifts to future illegitimate children.]—But the doctrine above laid down has only been applied to those cases where the gift has been to an illegitimate child actually *in ventre sa mere*, for it still remains undecided whether a gift to future illegitimate children with reference to the mother

only, and totally irrespective of the father, would be good, but the prevailing opinion seems to be against the validity of the gift, on the ground of the immoral tendency of such a disposition: (see 2 Jarm. on Wills, 156.)

When grandchildren will take under the description of children.]—In some instances, grandchildren will take under the description of children, where the gift would otherwise become inoperative for want of proper objects to take under it; as, for example, a bequest to the children of A., who is dead, leaving only grandchildren, in which case, rather than the bequest should fail, the grandchildren will be held to come under the designation of children: (*Crooke* v. *Brooking*, 2 Vern. 106.) It has, indeed, been said (*Radcliffe* v. *Bulkley*, 10 Ves. 195) that grandchildren will be included in a bequest under the term children wherever there are no children, although the person named as the parent be alive, and still capable of having children, who may afterwards answer to the required description. But this doctrine seems very questionable; for it would be extending the rule rather too widely to hold that the grandchildren, who are only admitted to take on the ground that there are no other objects to satisfy the gift, should nevertheless take to the exclusion of persons who might subsequently come *in esse* and fully answer the required description. Nor will the mere fact of the nonexistence of objects at the date of the will, or even at the time of the death of the testator, prevent objects subsequently coming into existence from claiming under the will. And whatever doubts may exist as to the question we have just been discussing, it is quite clear that where there is a gift to the children of several persons, if there are children of any of those persons, grandchildren will be excluded from taking with them: (*Radcliffe* v. *Bulkley*, *supra*.)

When great-grandchildren will be included under the term grandchildren.]—The rule above laid down with respect to children seems to apply as between grandchildren and great-grandchildren, viz., that where there are great-grandchildren and no grandchildren, great-grandchildren would be allowed to take under the latter description; but if there are any grandchildren, then the great-grandchildren will be excluded: (*Earl of Oxford* v. *Churchill*, 3 Ves. & Beav. 59.)

Of gifts to descendant's issue, &c.]—A gift to the descendants or issue of a particular person, will comprehend all

his descendants; as children, &c., who will consequently take as joint tenants and *per capita*, or in other words, all the children of every generation will take *pari passu*: (*Leigh* v. *Norbury*, 3 Ves. 340.) Whenever, therefore, it is designed that the children or issue are to be substituted for any deceased parent, and it is designed, as is almost universally the case, that they shall take *per stirpes*, and not *per capita*, it should be so stated in the will, otherwise the testator's intention will be thwarted in this particular: (see the form 2 Con. Proc., Part VII., No. VI., clause 19, p. 658, 2nd edit.)

Devises to heirs.]—Where real estate is devised to the heirs of a particular person, the person who answers that description at the time of the testator's death will be the party entitled. By this is meant the common law, and not the customary, heir, unless such customary heir is specifically distinguished from the heir general at common law: (Rob. Gav. 117; *Roberts* v. *Dixwell*, 1 Atk. 117.) And if any particular kind of heir is described, as heir male, or heir female, or heir of his name, or the like, the person claiming under such devise must answer the description in every particular, *i. e.*, he must be the very heir, as well as the heir male or female, or of the testator's name (Bro. Abr. tit. Donee, 61; *Counden* v. *Clarke*, Hob. 29); and the construction will be just the same, whether the devise be of a legal, or of an equitable estate: (*Starling* v. *Ettricke*, Pre. Cha. 54.) It is also essential that the ancestor should die before the testator, otherwise the devisee will not answer the description of heir, upon the long-established principle that *nemo est hæres viventis.*

Exception to the rule of nemo est hæres viventis.]—Still, the above rule is not so strictly adhered to as not to admit of some exceptions, where it is manifest from the expressions used by the testator that he did not intend to apply the word heir according to the strict legal acceptation of that term, but rather as a *designatio personarum* of the person intended to take; as where a devise was to the heirs of the body, *now living* (*Burchett* v. *Durdand*, Carth. 154); or where by any other expressions which have been used, or by the general context of the will, it appears that the testator meant to apply the term as heir apparent (*Goodright d. Brooking* v. *White*, 2 W. Blackst. 1010); in either of such cases the person answering the latter description will be entitled to take: *Pybus* v. *Mitford*, 1 Ventr. 372.) And where a person devises that such an one, as A. B., for instance, shall be his heir, the latter will be entitled to take in the same manner as if he were the

actual heir, although not strictly such, or even a stranger in blood to the testator: (*Taylor* v. *Webb*, Sty. 301; *Tilley* v. *Collyer*, Keb. 589.)

Testator not precluded from devising to his customary heir if he employs proper expressions to denote that intent.]—And although a devise to the heir is generally construed to mean the common law heir, there is nothing to prevent a testator from devising to a customary heir, if he chooses to describe him accordingly; and therefore, if a man seised of lands in gavelkind or borough English, or any other customary tenure, devise them to his heirs in gavelkind, borough English, or of what other tenure the lands may be, the special or customary heir will in such case take, although he be not the heir general at common law: (1 Vern. 733; Hob. 34.)

As to personal estate.]—With respect to gifts of personal estate, a different rule of construction prevails; for where property of the latter description is bequeathed to the heirs of a person, it will generally be construed to mean his next of kin (*Holloway* v. *Holloway*, 5 Ves. 503); and this, notwithstanding the real estate is limited to the heirs also, provided such limitations are by separate and distinct clauses: (*Gwynne* v. *Maddock*, 14 Ves. 488.) But, it seems, if the party is made heir both of the real and personal estate, thus blending the two properties together, then the person answering the description of heir to the real estate will be absolutely entitled to both the real and personal estate: (*Johnson* v. *Kelly*, 2 Ves. 885; *Rose* v. *Rose*, 17 *ib.* 347.) Nor will the construction be varied by the circumstance that the gift to the heir is in the singular number, and there are several persons required to fill that character; as where there is no male heir, and several daughters succeed as coheiresses: (*Mounsey* v. *Blamire*, 4 Russ. 384.)

Heirs may be construed to mean children.]—Under certain circumstances the word heirs may be explained to mean children; as in a case where a bequest was to A. and her heirs (*say children*), (*Trotter* v. *Trotter*, 4 Mad. 361); and in *Loveday* v. *Hopkins* (Ambl. 273), Sir T. Clarke, M. R., held that a bequest "to my sister B.'s children," was a sufficient ground for construing a distinct bequest "to my sister L.'s heirs" to mean children; and although one of the children died in the testator's lifetime, leaving issue, yet it

was held that one only surviving child at the death of the testator was entitled.

Alterations effected in the law respecting devises to heirs by modern enactments.]—Previously to the Wills Act (1 Vict. c. 26) a devise by the testator to his heir-at-law, whether under that term or by any other description, would have been void, and the heir would have taken in that character by descent, and not as a devisee, unless the estate he took under the will was of a different quality from that which he would have taken by descent; as, for example, where an estate for life was given to him, with limitations over in strict settlement, or where the devise was to daughters (coheiresses-at-law), in which latter case they would have taken as joint tenants with benefit of survivorship, and not as coparceners (Cro. Eliz. 431); or to one of several coheirs or coheiresses (Co. Litt. 163 b); in all of which cases they would have taken as devisees by purchase, and not by descent. But now, the above-mentioned act expressly provides, that where any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as devisee, and not by descent: (sect. 3.)

Devise to heir-at-law or next of kin void for uncertainty.]—A devise to the testator's heir-at-law or next of kin has been held void for uncertainty, and the property was directed to be distributed according to the Statute of Distributions: (*Lowndes* v. *Stone*, 4 Ves. 649.)

What persons are included under the term legal representatives.]—The term "legal representatives" has also afforded a subject of perplexing controversy; but it appears to be now decided that it is synonymous with the words "next of kin," and as descriptive of such persons as in case of intestacy would be entitled to the personal estate under the Statute of Distributions, and not the executors or administrators of the deceased: (*Robinson* v. *Smith*, 6 Sim. 47.) But a gift to the "legal representatives" will not apply to the next of kin where those words are used as mere words of limitation; as in the instance of a bequest to A. and his legal representatives; for in that case, the bequest will be construed in the same way as if limited to A., his executors and administrators, and thus pass the absolute interest to him (*Lugar* v. *Harman*, 1 Cox, 250); and the construction will be the

same if the limitation to his representatives has been preceded by an express estate for life (*Pierce* v. *Strange*, 6 Mad. 159); and where the word "assigns" is annexed to "executors and administrators," they have always been construed to be used as words of limitation, and not as designating the next of kin: (*Graffley* v. *Humphage*, 1 Beav. 46.)

Executors or administrators will not generally take beneficially under a bequest made to them in that character.]— Where the bequest was to the executors and administrators of a party, questions frequently arose as to whether the executors or administrators would take beneficially, or the property was to be administered by them as part of the personal estate of their testator or intestate. But the law upon this subject is now pretty clearly settled by the act 11 Geo. 4 & 1 Will. 4, c. 40, by which executors are expressly excluded from taking beneficially by virtue of their office, even of the undisposed residue of the personal estate of their testator. Still, this does not prevent a testator from conferring the beneficial interest upon either his own executors or the executors of any other person (*Watts* v. *Taylor*, 8 Sim. 241), if he employs the proper terms for the purpose: (see the form of a bequest of the residue to executors for their own benefit, 2 Con. Prec., Part VII., No. XXIII., clause 10, p. 761, 2nd edit.; see also bequests of legacies to executors for their own benefit, *id. ib.*, No. XXII., clause 28, p. 749, 2nd edit.) It may be proper also to suggest, that whenever legacies are given either to executors or trustees, it will be proper to state whether such legacies are so given as a compensation for their trouble in discharging the duties of their office, so as to prevent any questions from being afterwards raised, in case they should renounce or become incapable to exercise the office, as to whether they should still be entitled to claim their legacies; for notwithstanding the general rule seems to be against the claim, it is always the safer plan, by an explicit statement, to remove all doubt whatever upon the subject.

What persons are included under a bequest to the next of kin.] — A bequest to the next of kin will include such persons only as strictly correspond with that description (*Brandon* v. *Brandon*, 3 Swanst. 312); consequently it will not include either a husband or a wife: (*Nicholls* v. *Savage*, cited 18 Ves. 53.) And even where a bequest was to "my next of kin *as if I had died intestate*," the latter words were not considered sufficient to indicate an intent to include all

such persons as would be included under that statute in the case of intestacy: (*Garrick* v. *Lord Camden*, *supra.*) The term "next of kin" comprehends those only who properly answer to the appellation, to the exclusion of persons who claim by representation under the express clause of the statute 22 & 23 Car. 2, c. 10, explained by statute 29 Car. 2, c. 30 (*Elmesley* v. *Young*, 2 Myl. & Kee. 82); and thus, surviving brothers and sisters would exclude nephews and nieces, the children of deceased brothers or sisters, or a living child or grandchild, the issue of a deceased child or grandchild: (*Smith* v. *Campbell*, 19 Ves. 400.) But in a modern case, in which a question arose as to who were entitled, under the ultimate limitation in a marriage settlement in favour of such person or persons as shall be the next of kin to E. M. at the time of her decease? and E. M. died leaving a child, and also her father and mother, each of whom claimed one equal third share of the property as next of kin; Lord Langdale, M. R., decided that the parents, though postponed by the Statute of Distributions to children, were nevertheless entitled with the child concurrently as being of equal degree. His Lordship observed, "All writers on the law of England appear to concur in stating that in an ascending and descending line, the parents and children are in an equal degree of kindred to the proposed person; and I think, that except for the purpose of administration and distribution in the case of intestacy, and except in cases when the simple expression may be controlled by the context, the law of England does consider them to be in equal degree of consanguinity. The law of England gives a preference to the child over the parent in distribution; but I think we cannot, therefore, conclude with respect to every distribution of property, made in words to give the same to persons equally next of kin, the parents are to be held more remote than the child:" (*Whitby* v. *Mangles*, Rolls, 30th July, 1841, 4 Jur. 717.)

As to the term relations.]—A bequest to relations is construed to mean such persons as would be entitled to the personal estate according to the Statute of Distributions, and it seems there will be no difference in the construction, whether the gift relates to real, or to personal estate (1 Taunt. 263), or whether the term be used in the singular, or in the plural number, the term being regarded as *nomen collectivum*, and not as applicable to any single individual. And the construction will be the same, even where the term relations is preceded by the word "near,"

(*Whithome* v. *Harris*, 2 Ves. sen. 527), although it seems if the word "*nearest*" is associated with it, then the next of kin, strictly so called, will take, to the exclusion of those who would be entitled under the Statute of Distributions.

Gifts to poor relations, &c. how construed, &c.]—Perplexing questions, which have involved some contrariety of decisions, have arisen (*Widmore* v. *Woodroffe*, 1 Amb. 636) where the term "poor," or "the most deserving," or "the most necessitous" has been superadded to the word "relations;" but, generally speaking, those terms annexed have been considered too vague and uncertain to point out the particular objects intended, or to vary the construction the word relations, standing simply and alone, would otherwise have borne: (*Widmore* v. *Woodroffe*, *sup.*) Still, when aided by the context, bequests to poor relations have been construed as charitable bequests, and have been supported accordingly, unless where the gift has been of real estate, or a charge upon lands or things savouring of the realty, in which case the gift will be clearly void under the Statute of Mortmain: (*Hall* v. *Attorney-General*, Rolls, 28 July, 1829.)

When a gift to poor relations has been construed a charitable bequest.]—Where gifts to poor relations have been most frequently supported as charitable dispositions, has been where a discretionary power of distribution in favour of the objects embraced by the term has been conferred either upon the executors or trustees of the will (*Woolridge* v. *Bransden*, Ambl. 507): or where the testator points out the particular objects of the gift; as for "the purpose of putting out poor relations apprentices" (*Attorney-General* v. *Price*, 17 Ves. 371); or where it is apparent from the context that charity is the testator's main object; as in the case of *Mahon* v. *Savage* (1 Sch. & Lef. 111), where a testator bequeathed 1000*l.* to his executor to be distributed amongst his (the testator's) *poor relations*, or *such other objects of charity* as he should mention in his private instructions. He left no instructions; yet Lord Redesdale held that the testator's design was to give to them as objects of charity, and not merely as relations. His Lordship also considered that the executors had a discretionary power of distribution, and that such bequest need not include all the testator's poor relations.

As to the time at which the objects are to be ascertained who claim under a bequest to the next of kin.]—With respect to the

time at which the objects are to be ascertained who are to take under a bequest to the next of kin, this will depend upon whether the gift is to the testator's next of kin, or to the next of kin of some other person.

Where the gift is to next of kin of the testator.]—If the gift is to the next of kin of the testator, whether it be direct or preceded by a previous life estate, or other limited interest, it will in either case vest the property in such persons as come within the description of the testator's next of kin at the time of his decease. The only difference being, that in the latter case the gift to the next of kin is subject to the preceding life or other limited interest: (*Harrington* v. *Harte*, 1 Cox, 131.)

Where the gift is to next of kin of another person.]—Where the gift is to the next of kin of another person, the objects cannot be ascertained until after that person's decease, and will then vest in such parties as shall first sustain that character, without any reference as to the time at which the distribution is directed to be made: (*Danvers* v. *Earl of Clarendon*, 1 Vern. 35; *Crawys* v. *Colman*, 9 Ves. 319.) But if the person to whose next of kin the bequest is made be dead at the time the will is made, or should die during the testator's lifetime, then the gift will vest in all such objects as answer the description of his next of kin at the time of the testator's death: (*Vaux* v. *Henderson*, 1 Jac. & Walk. 388, n.) But if the gift be restricted to the next of kin living at the time of distribution, then, it seems, a double qualification will be necessary; or, in other words, it will be necessary for the claimant to fill the character of next of kin at the time of the testator's death, and also to survive the specified period of distribution: (*Spink* v. *Lewis*, 3 Bro. C. C. 355; *Holloway* v. *Holloway*, 5 Ves. 339.)

Testator may confine the gift to such persons only as shall answer the description at some particular period.]—The rule we have just mentioned does not, however, prevent a testator from expressly directing that, upon the happening of certain events, the persons answering the description of next of kin at that particular period shall be the objects of the gift; consequently persons answering the description at that time would be entitled, without any reference as to whether or not they sustained that character at the time of the death of the testator: (*Long* v. *Blackall*, 3 Ves. 386.)

When the gift is to the relations or next of kin of a particular name.]—A gift to relations or next of kin of a particular name, will operate as *nomen collectivum*, and include all persons of the name in equal degree, whether the subject-matter of the gift consists of real, or of personal estate: (*Pyot* v. *Pyot*, 1 Ves. sen. 335.) And a devise to nearest relations of a particular name, will entitle parties to take under that description, although in strictness they are not the nearest relations of the testator. Thus, for example, if property was given to be divided between the nearest relations of the testator, viz., the Greenwoods, the Everetts, and the Downes, the Everetts, although not in so near a degree of relationship to the testator as the Greenwoods and the Downes, would nevertheless be entitled to take under the above description: (*Greenwood* v. *Greenwood*, cited 1 Bro. C. C. 30, n.) But a woman who is a relation marrying one of the name required will not thereby become entitled to participate in the gift; neither will the voluntary assumption of the required name entitle a party, originally of another name, to support his claim under a devise of the above kind; for although he has adapted himself to the description, yet it would be considered to be contrary to the testator's intention that he should be allowed to take under it: (*Leigh* v. *Leigh*, 15 Ves. 92.)

As to the time at which the party should answer the prescribed qualification.]—The time at which the party must answer to the prescribed qualification, will depend upon the nature of the interest he takes in the property. If he is to take a vested estate, whether such estate be in possession, or in remainder, or reversion, it is essential he should answer the required description at the time of the testator's decease: (*Bon* v. *Smith*, Cro. Eliz. 532; *Jobson's case*, *ib.* 576.) But where the party is to take a contingent or executory estate, as, where his estate is preceded by gift in fee simple, subject to a limitation over by way of executory devise in his favour in case the first devisee shall die under the age of twenty-one years, or without leaving any issue living at the time of his decease, it will be sufficient if he acquires the prescribed qualification at any time before the happening of the contingency: (*Pyot* v. *Pyot*, 2 Ves. sen. 335.)

Construction of the term "family."]—The term "family," has been construed in a variety of ways, depending in great measure upon other words in the will, with which it has been associated. Sometimes it has been construed to mean the

heir upon whom the family estate is to devolve; sometimes to mean children; at others to signify relations or next of kin, and not unfrequently it has been treated as so vague and uncertain an expression as to render the devise void altogether for uncertainty.

Where the term "family" is considered synonymous with "heir."]—Where lands have been devised to a stock or house, it has been construed to mean the heir who inherits the property of that stock or house (*Counden* v. *Clerke*, Hob. 29; *Chapman's case*, Dy. 333b); as in the case of a devise to C. and her heirs for ever, upon the fullest confidence that after her decease she would devise *the property to his (the testator's) family*, which was held to be a trust for the testator's heir: (*Wright* v. *Atkyns*, 17 Ves. 255; Coop. 111; 1 Turn. 143.) A similar construction was also adopted where the devise was to his sister C.'s family, to go in heirship for ever: (*Doe d. Chattaway* v. *Smith*, 5 Mau. & Selw. 126.) But it seems that this construction has only been allowed to prevail in the case of a devise of real estate, and would not be applied to a bequest of personal property; and it is even doubtful whether it would be applied to gifts embracing both the real and personal estate.

Where the word family has been considered to mean children.]—In some cases, as we have just before remarked, the word family has been considered to mean children; as where a testator devised the remainder of his estate to be equally divided between his brother L.'s and sister E.'s family, in which case it was held that the word family was to be construed as synonymous with children, and that the children of the brother and sister took both the real and personal estate, and that they took *per capita:* (*M'Leroth* v. *Bacon*, 5 Ves. 159; *Doe d. Chattaway* v. *Smith*, *sup.*) And in general a power to appoint to A. and her family, will be held to include her and her children; but her husband, unless the term is aided by the context, will be excluded; but if so aided, he may be included by it, as in the case of *M'Leroth* v. *Bacon* (*sup.*), in which case a direction to a trustee to pay a legacy as he should consider most beneficial for A. and her family, was considered sufficient to include him, although the court at the same time admitted that in general under a power to appoint to A., the husband would be excluded.

Where the word family has been construed to mean next of

kin or relations.]—Where the word family has been construed to mean next of kin or relations, has been where, by the context, the testator has shown he used the term as synonymous with "kindred" or "relations;" as in a case where, after bequeathing her property to her sister for life, whom she made her executrix, the testatrix declared it to be her desire that she, the sister, should bequeath it at her own death "*to those of her own family, what she has in her own power to dispose of that was mine,*" in which it was held that the expression of "her own family" was equivalent to "*of her own kindred,*" or "of her own relations," and that she not having exercised that power, it was therefore a trust for her next of kin.

Where the word family has been rendered void for uncertainty.]—But it has sometimes happened that the term "family" has been used in so vague a manner, as to render the gift void for uncertainty; as where a testator gave leasehold estates to his brother T. H. for ever, hoping he will continue them in the family, which was considered too indefinite to create a trust, as the words did not clearly demonstrate an object: (*Harland* v. *Trigg*, 1 Bro. C. C. 142.) So also where a testator bequeathed residuary, real, and personal estate to his wife for life, and after her decease, one half to his wife's family, *and the other half to his brother and sister's family*, share and share alike, and it appeared that the testator's wife had one brother, who had two children, and the testator had one brother and one sister, each of whom had children, and there were also children of another sister, who were dead, the court held that upon these facts the devises were void, for the uncertainty in each case as to who was meant by the word "family;" and in the latter case, also, from the uncertainty whether it applied to the family, as well of the deceased, as of the surviving sister: (*Hayter* v. *Joinville*, 3 East, 172.) And where a testatrix gave the residue of her effects to be equally divided between her said daughters (to whom she had previously bequeathed certain legacies in trust for, free from the control of any husband for life, and after their decease for their respective children) and their husbands and families, the bequest was held to be void for uncertainty, and Sir L. Shadwell, V. C., observed, the word "family" is an uncertain term, it may extend to grandchildren as well as children. The most reasonable construction is to reject the words "*husbands and families.*" And it was accordingly decreed that the daugh-

ters took the residue absolutely as tenants in common: (*Robinson* v. *Waddelow*, 8 Sim. 134.)

What persons will be included under a devise to servants.]—A bequest to servants generally will include in and out door servants, but not stewards of courts, or other temporary servants, or persons hired by the job: (*Townsend* v. *Wyndham*, 2 Vern. 546; *Chilcot* v. *Bromley*, 12 Ves. 114.) And if a testator bequeaths legacies to a certain number of his servants, and he has in fact more than the specified number, it seems they will all be entitled, otherwise the devise would fail for uncertainty: (*Sleech* v. *Thorington*, 2 Ves. 564; *Gawey* v. *Hilbert*, 19 Ves. 125.) But to prevent any questions from being raised upon the subject, the proper course will be to ascertain what particular number and kind of servants the testator intends to be the objects of his bounty, and then to describe them accordingly: (see forms of bequests of legacies to servants, 2 Con. Prec., Part VII., No. XIV., clauses 4 to 8 inclusive, p. 705, 2nd edit.; *id. ib.* No. XVI., clauses 10 & 11, p. 711; see also forms of gifts of annuities to servants, *id. ib.* clauses 11 & 12, pp. 705, 706.)

CHAPTER IV.

DESCRIPTION OF THE PROPERTY INTENDED TO BE DEVISED.

I. As to Devises of Lands and Chattels Real.

II. Bequests of Chattels Personal, and other Personal Property.

III. Of the Residuary Clause.

I. As to Devises of Lands and Chattels Real.

The statute 1 Vict. c. 26, has remedied many of the inconveniences which formerly arose through inadvertence in describing the property intended to be devised, particularly when it consisted of lands held under various tenures, as freehold, leasehold, and copyhold, all occupied together and designed to pass under one general description, but described in terms applicable to the freehold portion of the property only, in which case, unless it appeared from some expressions in the will that the testator intended to comprehend the leaseholds or copyholds as well as the freeholds, the latter property only would have been held to pass: (*Thompson* v. *Lawley*, 3 Bos. & Pull. 308.) In cases also where the testator's power of testamentary disposal arose from a power of appointment, his intention was oftentimes thwarted by his having omitted to employ any expressions in his will indicative of an intent to exercise this power, in which instance, according to the rule laid down in *Sir Edward Clere's case* (6 Co. 17b), a devise without reference to the power would have no effect, unless, for want of any other property in the testator beyond that over which he had a power of ap-

pointment, the will must otherwise have been inoperative altogether. In the case of personal estate, therefore, an omission to refer to the power must generally have proved fatal, because every person is possessed of some personal property or other upon which the will could operate; and the court have never looked beyond the will, or into the quantum, however inadequate it may be, to satisfy the terms of the bequest; neither would the court have looked into the state of the personalty at the time the will was made, or at the death of the testator, in order to collect his intention; and so strictly was this rule adhered to, that an inquiry of this nature has been refused, notwithstanding the testatrix had given the precise sum she was empowered to dispose of, and had no other fund out of which the bequests could have been satisfied: (*Jones* v. *Tucker*, 3 Mer. 533.)

Alterations effected by 1 *Vict. c.* 26.]—The evils above enumerated have been much lessened, if not altogether removed, by the statute 1 Vict. c. 26, by which it is enacted, that a general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands, unless a contrary intention shall appear by the will: (sect. 26.) And with respect to appointments in exercise of powers, it further enacts, "that a general devise of real estate shall include estates over which the testator has a general power of appointment, unless a contrary intention shall appear by the will" (sect. 27); and in like manner, a bequest of the personal estate of the testator described in a general manner is to be construed to include any personal estate to which such description shall extend, unless a contrary intention shall appear by the will: (*ib.*) As, therefore, a general devise of the testator's lands will now include copyhold and leasehold, as well as freehold estates, it will be necessary expressly to except the two former kinds of property, whenever it is intended that they shall not pass together with the freehold portion of the testator's property.

Practical suggestions.]—And notwithstanding the many advantages conferred by the above-mentioned enactments, persons penning wills cannot be too careful in being accurate in their description of the testator's landed property, and this, more particularly, where any portions of it are to be specifically disposed of between different devisees, so that the subject-matter of each specific devise may be distinctly identified and distinguished from the rest; and wherever, as

often happens, some parts of an estate or farm, where all are held under the same denomination, as "The Ashton Estate," for example, consists of copyhold or leasehold, as well as freehold estates, it will, nevertheless be proper to insert such a description as will include both kinds of property; still it will not be necessary, neither is it the usual practice, to set out a long description of the parcels, as is commonly done in an ordinary purchase deed, but merely to insert a concise description sufficient to identify the property intended to pass by the devise: (see short form of devise of a manor and manorial rights and royalties, 2 Con. Prec., Part VII., No. XIV., clause 2, p. 697, 2nd edit.) Sometimes the occupancy of the tenant of the premises has been inserted, yet cautious practitioners have considered it a more prudent course to omit any reference to the occupancy, lest it should fail to correspond with the tenancy of some portion of the devised property, although it seems an error in this respect would not prejudice the devise, if the description given by the will is sufficient to identify the parcels in all other respects: (see the form of a specific devise of a farm consisting both of freehold and leasehold property, 2 Con. Prec., Part VII., No. XI., clause 2, p. 681, 2nd edit.)

As to a general devise of real estate.]—The words "all my real estate," will alone be sufficient to comprehend the whole of the testator's landed property: but unless brevity is desired, it is the usual practice to pen a clause of general devise rather more fully, as for example, "all my freehold lands, tenements, and hereditaments, whatsoever and wheresoever, which I, or any person or persons in trust for me, is or are seised or entitled to, whether in possession, reversion, remainder, or expectancy:" (see the form 2 Con. Prec., Part VII., No. I., clause 2, p. 642, 2nd edit.)

Where the devise is intended to include leasehold as well as freehold estate.]—If copyhold or leasehold property is also to be included in the general devise, it will be correct to annex it to the gift of the freehold property; as for instance, "all my freehold and leasehold lands," &c.: (see the form of general devise of freehold and leasehold property, 2 Con. Prec., Part VII., No. II., clause 1, p. 662, 2nd edit.; see the form of general devise of freehold, copyhold, and leasehold estates, *id. ib.* No. XXVII., clause 1, p. 786.) But where estates held for a term of years, whether absolute or determinable on lives, are intended to be specifically bequeathed, and the testator designs the legatees shall take a legal estate

therein, it will be necessary to except, in express terms, the leasehold portion of the property out of the general devise, otherwise they will be comprehended in the general terms of the devise of the testator's real estate: (1 Vict. c. 26, s. 26.) The propriety of preventing the leasehold premises from passing under the general devise is, that being chattels, although chattels real, they will not come within the operation of the Statute of Uses, so that if devised to the trustees of the will, the latter could not, as in the case of a limitation of freehold property, be used as a conduit pipe to pass the legal estate in the legatees of the term; for the general gift to the trustees will invest them with the whole legal estate, and render an assignment from them necessary to pass such legal estate to the legatees.

Propriety of appointing the legatees of a term as special executors thereof.]—It is also a common as well as prudent course to constitute the specific legatees of a term of years as special executors of this portion of the testamentary estate, which will have the effect of relieving the general executors from all liabilities with respect to it. This is sometimes a matter of importance to the latter, particularly where the rents of the premises bequeathed bear any considerable portion to the annual value of the property, or the leases contain any stringent or burdensome covenants; for which, in fact, the executors continue responsible, notwithstanding the property has by their assent become actually vested in the legatees: (see the form appointing a special executor of a term, 2 Con. Prec. Part VII., No. XXXIV., clause 3, p. 826, 2nd edit.)

How a bequest of leasehold premises should be penned.]—In penning a bequest of leasehold premises, whether held for a term of years absolute, or determinable upon lives, the property should be concisely but accurately described in the same manner as in a devise of freeholds, as also the term which the testator has in the premises: see the form 2 Con. Prec., Part VII., No. XXXIV., clause 2, p. 826, 2nd edit.) It will also be correct to add to the bequest "all the testator's estate, interest, and right of renewal therein:" (see the form 2 Con. Prec., Part VII., No. XIV., clause 9, p. 702, 2nd edit.) This addition was formerly more necessary than at the present day, because, notwithstanding it was a long established rule that a general bequest of leaseholds would have comprehended all such leasehold estates as a testator was possessed of at the time of his decease, with-

out any reference to the time at which he became possessed of them (*Churchman* v. *Ireland*, 1 Russ. & Myl. 251), the law was otherwise in the case of a specific bequest of a leasehold estate, which, if the term had been renewed subsequently to the will, would have been a revocation of the gift, unless some other expressions, beyond the specific disposition, had been annexed to the bequest, from which an intent to pass the benefit of future renewals might reasonably have been inferred: (*James* v. *Dean*, 11 Ves. 385; *Back* v. *Kett*, Jac. 534.) Yet, whenever the general words were sufficient to express that intent, then the renewed leases would have passed; as, for example, where a testator added to the bequest, "all his right, title, and interest" (*Abney* v. *Miller*, 2 Atk. 593), or, "all benefit and right of renewal" in the term (*ib.*), or any other expression bearing a similar import. Nor did the rule above laid down affect equitable interests in leaseholds: (*Attorney-General* v. *Downing*, Ambl. 572.) Neither would the act of surrendering a lease for the purpose of effecting a renewal have adeemed the previous bequest; to have produced that operation, the renewed lease must have been actually executed: (*Abney* v. *Miller*, *sup.*) The cause of the bequest becoming revoked in the above cases was the ademption or withdrawing of the subject-matter of the specified gift, and the renewed lease, being treated as an entirely new thing, was not comprehended in the specific description contained in the former disposition. In this respect the law is now completely altered by the Wills Act, 1 Vict. c. 26, by which, in the absence of a contrary intention, a will is made to speak from the testator's death; so that if the words employed in the will are sufficient to describe the property, it will pass under that description, without any reference as to whether or not any renewals were obtained prior or subsequently to the date of the will.

As to copyholds.] — As copyhold estates do not come within the operation of the Statute of Uses, it will generally be advisable to except them expressly out of the general devise of the testator's real estate, and give them direct to the parties the testator intends shall have them; for if included in the terms of general devise to the trustees of the will, it will be necessary that the latter should be admitted to the copyholds, and surrender to the devisee's use, and an admission thereupon will be required to perfect his title as complete legal owner of the

devised premises, and thus the cost of one surrender and two admittances will be incurred, whereas one admittance, viz., that of the devisee, would have sufficed, if the devise had been to him direct according to the suggestions above laid down.

Where copyholds are to be sold.]—Even where a testator designs his copyhold estates shall be sold and converted into money, for any of the purposes of his will, it will be better to except them from the general devise of his real estate, and, instead of devising them to any one, to give the trustees of the will a mere authority to sell, so as not to vest any estate either in them or any one else, separate from the power: (see the form 2 Con. Prec., Part VII., No. I., clause 5, p. 634, 2nd edit.) By adopting this course any purchaser in whose favour the power is to be exercised will be in under the will, and thus one fine only will be incurred (*Beal* v. *Shepherd*, Cro. Jac. 199; *Sulyard* v. *Preston*, 2 Wills. 400), the legal estate will, in the meantime, descend on the testator's heir-at-law, who, if he be voluntarily admitted, must pay his own fine, which, however, he may easily avoid by forfeiture, as he takes nothing more than a mere dry and unprofitable legal estate; still, as the lord has an undoubted right to insist that the proper person shall be admitted, and to seize after three proclamations, the power of sale ought to be exercised as early as possible, in order to prevent this consequence; and if the lord should persist in demanding the admission of the heir, the safer plan will be to get him admitted, as even the costs of the admittance, and the subsequent surrender of one person, will be attended with less expense than if the whole number of trustees appointed by the will were to be admitted, and make such surrender. It will also be advisable, whenever the heir is of full age, to limit the intermediate rents and profits to him, to be applied by him to the purposes of the will, which will constitute him a trustee for that purpose: (see the form 2 Con. Prec., Part VII., No. I., clause 7, p. 635, 2nd edit.) Another reason for devising the intermediate profits to the heir, where the trustees are to take a mere authority, is to prevent their power of disposing of the fee from being made a ground for holding that they are to take the inheritance. It is also advisable to restrict the power of sale to twenty-one years from the testator's death, to prevent any questions being raised as to the power of sale creating a perpetuity: (see the form 2 Con. Prec., Part VII., No. I., clause 5, p. 634, 2nd edit.)

As to estates vested in a testator in trust, or by way of mortgage.]—Estates vested in a testator in trust or by way of mortgage, even independently of the Wills Act, 1 Vict. c. 26, will pass under a general devise of his real estate: (*Ex parte Sergison*, 8 Ves. 147.) Still the more correct plan will be to mention them expressly, and also to point out in what manner they are to be disposed of. The usual way of effecting this object is to except out of the clause of general devise of the testator's real estate, at the commencement of the will, all such estates as are vested in him in trust or by way of mortgage, which are afterwards devised to the trustees by a distinct clause towards the end of the will: (see the form 2 Con. Prec. Part VII., No. XLIII., clause 1, p. 892, 2nd edit., *id. ib.*, No. XLIV., clause 1, p. 906.) Still it is not an unfrequent practice for trust and mortgage estates to be devised to the trustees of the will by the clauses of general devise to them of all the testator's real and personal estate: (see the form 2 Con. Prec., Part VII., No. II., clauses 1 and 6, pp. 641, 643, 2nd edit.)

A simple devise of testator's real and personal estate sufficient to comprehend the whole of his property.]—The forms above suggested are, however, in reality rather more matter of form than essentially necessary to the validity of the will itself; for a simple devise of all the testator's real and personal estate will pass property of whatever kind and description he may die possessed; and it may often be found prudent to adopt this concise description, in preference to the longer and more technical forms, particularly in those cases in which a testator, from sickness or debility, is ill able to endure the fatigue of having a long instrument read over and explained to him: (see a very short form of will devising all testator's real and personal estate to his wife, and appointing her his executrix, 2 Con. Prec., Part VII., No. VII., p. 472, 2nd edit.)

As to tithes and land tax.]—If a testator is possessed of the tithes, or the land tax arising or issuing out of any lands, and also of the lands themselves, and is desirous of devising the tithes or land tax to the same devisee as the lands, care must be taken to devise the tithes or land tax in express terms, as well as the lands, to the devisee; for neither tithes nor land tax will pass under the term appurtenances, or any other general words applicable to the lands themselves, so that, unless specifically devised, they will either descend

upon the testator's heir-at-law, or be included in a general residuary devise of the testator's real estate, if that clause contains words sufficiently ample to embrace all the testator's real property not otherwise disposed of.

As to lands contracted to be purchased by, but not actually conveyed to, the purchaser.]—It sometimes happens that a testator wishes to devise lands which he has contracted for, but which have not actually been conveyed to him. This generally occurs where a person has been let into possession under an agreement to purchase, and delays have been incurred in the completion of the contract; and difficulties have arisen upon the title which it has taken time to remove, or which may render it doubtful whether a marketable title may ever be made to the premises. When this occurs, the testator should be asked whether or not the intended devisee is to have the benefit of the purchase money in case of the contract being rescinded; otherwise the devisee will, unless the contract be actually complete, lose all benefit under the devise; for he will neither be entitled to the money agreed to be paid for the intended purchase, or to have other lands bought for him in lieu thereof: (*Broome* v. *Moncke*, 10 Ves. 597; *Sewage* v. *Carroll*, 1 Ball & B. 265.) Nor will the devisee under such circumstances be allowed to waive all objections and take a defective title, although the testator himself might claim to have done so (*Collier* v. *Jenkins*, You. 295); for after his death the court will not speculate on what he would, or would not have done; the only question is, whether at the time of his death there was an existing contract by which he was bound, and which he could be compelled to perform; for that alone it is that can give a devisee a right to call for the personal estate to be applied in completing a purchase: (*Potter* v. *Potter*, 1 Ves. 438; *Radnor* (*Earl of*) v. *Shafto*, 11 Ves. 448.) But if the contract is abandoned, not on account of any imperfection, either in the contract, or in the vendor's title, but on account of circumstances arising subsequently to the testator's death; as, for example, where his estate does not afford the means of paying the purchase money within the time prescribed by the terms of the contract, in that case the purchase money will not sink into the personal estate; but must be laid out in other lands to the same uses as the testator had devised the lands contracted for: (*Whittaker* v. *Whittaker*, 4 Bro. C. C. 30.)

Practical suggestions.]—The best way of avoiding disputes

where the testator designs, as is generally the case, that the devisee shall have the benefit of the devise at all events, is to add to the devise a clause stating the testator's will to be that in case of the contract being rescinded for any cause whatever, that his executors shall lay out the same amount of purchase moneys in the purchase of other lands to be conveyed to the same uses for the benefit of the devisee as were limited to him by the will: (see the form 2 Con. Prec., Part VII., No. XXI., clauses 4 & 5, pp. 737, 738, 2nd edit.) To this may be superadded a clause that until an eligible purchase can be found, the executors shall invest the purchase moneys in some of the public stocks or funds, and pay the dividends in the interim to the devisee: (*Id. ib.*, clause 6, pp. 738, 739.)

Where there is a probability of the devised property being sold.] — When there is any probability of the devised property being sold, and the testator intends the devisee to have the benefit of the purchase money, a clause to that effect ought always to be inserted; because not only an actual sale, but even a contract entered into by the testator for the sale of the devised premises, if it be such as a court of equity would decree the specific performance of, will be an equitable revocation of the devise, leaving nothing but a dry legal estate in the devisee, which he would hold as a trustee for the purchaser, and which he would be bound to convey to him on the completion of the purchase, without the slightest right to claim the purchase money, which will then form part of the testator's general personal estate: (*Rawlins* v. *Burgis*, 2 Ves. & Bea. 385.) A doubt has certainly been suggested (Sug. on Wills, 53; Sug. Vend. 304), as to whether this doctrine was not altered by the Wills Act (1 Vict. c. 26), but the cases which have since been determined upon the subject show clearly that such doubts are altogether without foundation, and that, as well subsequently, as previously to the Wills Act, the devisee will have no claim whatever upon the purchase money. Thus, in *Farrer* v. *Earl of Winterton* (5 Beav. 1), a testator devised a real estate and afterwards sold it. The purchase was not completed until after the death, and it was held that the purchase money belonged to the personal representatives of the testatrix, and not to her devisees, notwithstanding her lien on the estate for her purchase money, and notwithstanding the 1 Vict. c. 26, s. 23, which directs "that no conveyance or other disposition made or done subsequently to the execution of the will or relating to any real or

personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of a will with respect to such estate or *interest* in such real or personal estate as the testator shall have power to dispose of at the time of his death." And Lord Langdale, M. R., observed, "the question whether the devisees can have any interest in that part of the purchase money which was unpaid, depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity she had alienated the land, and instead of her beneficial interest in the land she had acquired a title to the purchase money. What was really hers in right and equity was not the land but the money, of which alone she had a right to dispose, and though she had a lien upon the land and might have refused to convey till the money was paid, yet that lien was a mere security in or to which she had no right or interest, except for the purpose of enabling her to obtain payment of the money. The beneficial interest in the land which she had devised was not at her disposition, but was by her act wholly vested in another at the time of her death; and the case is clearly distinguishable from cases in which testators, notwithstanding conveyances made after the dates of their wills, have retained estates or interests in the property which remain subject to their disposition. Being of opinion that by the contract the testatrix must in this court be deemed to have alienated the whole of her beneficial interest in the estate; that at the time of her death she had no beneficial interest in the land at her disposition, and that the will only passes that which was at her disposition, I am of opinion that the devisees of the land have no interest in the purchase money:" (5 Beav. 8 & 9.)

Practical directions.]—If, therefore, the testator intends the devisee shall have the purchase money of the devised premises, in case they should be afterwards sold, it will be proper to add to the devise that in case the devised premises shall at any time be sold or contracted to be sold by the testator, the devisee shall be entitled to the purchase money: (see the form 2 Con. Prec., Part VII., No. XXI., clause 3, p. 737, 2nd edit.)

Where devised premises are charged with mortgages.]—When a testator devises any lands or other property that is charged with any mortgage debt, he should always state whether the devisee is to take the devised premises dis-

charged from or onerated with the incumbrance: (see the form of a devise of lands charged with the mortgage debt, 2 Con. Prec., Part VII., No. XXI., clause 8, p. 739, 2nd edit.; *id. ib.* No. XXXIV., clause 4, p. 827.) As the law formerly stood, the personal estate being considered to be the primary fund for the payment of debts of every kind, the heir or devisee of mortgaged premises would have been entitled to call upon that fund to discharge the mortgage (*Cope* v. *Cope*, 2 Salk. 449); so that even a direction from the testator to sell or mortgage his real estate for the payment of his debts and legacies would have been insufficient to exonerate the personal estate from its primary liability. But some very important alterations have lately been made in the law in this respect by the act 17 Vict. c. 113, by which it is enacted, that when any person shall, after the close of the year 1854, die, seised of any estate or interest in lands, or other hereditaments which is, at the time of his death, charged with the payment of any sum of money by way of mortgage, and such person shall not by his will or deed have signified a contrary intention, the heir or devisee shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the lands or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of the mortgage debt with which the same shall be charged, and every part thereof, according to its value, bearing a proportionate charge of the mortgage debts chargeable upon the whole; but nothing in this act is to affect or diminish any right of the mortgagee on such lands to obtain full payment of his mortgage debt, either out of the personal estate of the deceased, or otherwise; neither are the rights of any person claiming under a deed or will already made at or before the first day of January, 1855, to be affected by this act, and to which, therefore, the pre-existing law remains still applicable.

II. Bequests of Chattels.

A general bequest of personal estate will comprehend the testator's personal property, of every kind and description, whether moveable or immoveable; consequently, whenever it is intended that any particular parts of his personal estate are not to pass under it, it will be necessary to except them in express terms. So, where any specific

articles are intended to be bequeathed to different individuals, and the terms applicable to one kind would be sufficiently comprehensive to embrace the whole, it will be necessary to except in express words the articles it is not designed to include. Thus, for example, suppose a testator wishes to bequeath his household furniture to one person, and his plate, linen, china, or glass to another, it will be requisite to except the plate, linen, china, or glass out of the bequest of the household furniture, because all those latter articles, if suitable to the degree of the testator, will pass under the term furniture: (*Nicholls* v. *Osborn*, 2 P. Wms. 420; *Kelly* v. *Powlett*, Ambl. 605.) But if, on the other hand, a testator designs that the legatee shall not only have all the articles above enumerated as well as his household furniture, but his wine and books also, it will be necessary, in order that these should pass, to annex them to the bequest of the furniture, as that term standing alone will be insufficient to include them: (*Bridgman* v. *Dove*, 3 Atk. 202; *Porter* v. *Tournay*, 3 Ves. 311; see forms of specific bequests of books, 2 Con. Prec., Part VII., No. XXXIV., clauses 5 & 6, p. 827, 2nd edit.) Nor, it seems, will globes and mathematical instruments pass under a bequest of household furniture: (Pre. Chs. 207, n.) To prevent disputes, the proper plan is not only to except any articles in express terms which are intended to be excepted, but also to enumerate the nature of all the articles the testator actually intends to pass as household furniture, and thus prevent the possibility of any question being ever raised upon the subject: (see the form, 2 Con. Prec., Part VII., No XXII., clauses 4 to 25, pp. 743, 748, 2nd edit.) And all other articles whatever that are intended to be specially bequeathed ought to be particularly described, so as to leave no doubt as to the identity of the particular articles the testator wishes to dispose of: (see also *Id. ib.*, No. XXXIV., clauses 4 to 8, p. 827.)

As to furniture in a particular house.]—If a testator intends his household furniture to pass without any reference as to the house in which it may chance to be at the time of his decease, it should be so stated in the will; for if described as contained in, or belonging to any particular house, the removal of it to another would operate as an ademption of the bequest. Hence, where a testator by his will described himself as of Bromfield-place, Ealing, and then gave all his household furniture, &c., which should be in or about his dwelling-house at the time of his decease, to his wife for

her life, and when he made his will he was living at Bromfield-place, but afterwards removed with the aforesaid furniture to Battersea, where he died, it was held that his widow took no interest in the furniture in Battersea-house: (*Holding* v. *Cross*, 25 L. T. Rep. 28.) Nor will furniture purchased for the express purpose of being placed in a particular house pass under the description of furniture of that house, although packed with the intention of being, but not actually, placed therein: (*Duke of Beaufort's case*, 2 Vern. 739.) And the like observations are applicable to plate, books, pictures, or any kind of moveables, if described as being in or belonging to any particular places or dwelling-house: (*Earl of Albemarle* v. *Rogers*, 2 Ves. 481.)

As to furniture or other moveables used by the testator in his trade.]—Where furniture or other moveables employed by a testator in his trade are intended to pass, as well as those used by him for mere domestic purposes, it should be so expressed, otherwise they will not be included in a bequest of his household goods or furniture. Thus, a bequest in those terms made by the keeper of a tavern would only include such furniture as was kept by him for domestic and personal use, and not such furniture or other articles as were used for the purpose of conducting the business of the tavern, or the lodgings or accommodation of the guests frequenting it: (*Manning* v. *Purcell*, 24 L. T. Rep. 127.) Neither will a bequest under the above-mentioned terms include plate employed by a silversmith in his trade, although, undoubtedly, it will pass such plate as is commonly used by him in his house; neither would goods which a contractor for the Government has in his hands in that character pass under a bequest of either his household furniture, or his goods: (*Pratt* v. *Jackson*, 2 P. Wms. 682.) The term, "household stuff," is not often used in modern wills, but it has been construed to have much the same meaning as household furniture, and to include everything appertaining to the personal comfort and convenience of the family; so that plate, if used by the family, would pass under those terms: (Swin. 849.) But it has been held that plate will not pass under the word utensils: (Day, 59.) The word "moveables," has also an extensive operation, comprehending goods both actively and passively moveable: (Swin. 93, 7th edit.) But it seems that debts will not pass under that term.

As to bequests of wearing apparel, linen, ornaments of the

person, &c.]—In case of bequests of wearing apparel, linen, ornaments of the person, or things of a like nature, they ought to be clearly specified and described; particularly where the same word is applicable to things employed for different purposes, as the term "linen," for example, which includes linen worn on the body, and also table and bed linen. The construction which this word therefore will receive must depend in great measure, if not entirely, upon the other words with which it is associated. If coupled with the terms household furniture, plate, &c., it would be considered to include table and bed linen, towels, and articles of a like kind, employed in the domestic purposes of the house, but not shirts or articles of that kind; but if annexed to a bequest of wearing apparel then, it seems, body linen, and that only would be held to pass: (*Hunt* v. *Hort*, 3 Bro. C. C. 311.) Where ornaments of the person are to pass, it will be proper to state the nature of them, or at any rate to give such a general description as will be sufficient to include all such as the testator intends to give: (see the form 2 Con. Prec., Part VII., No. VI., clause 4, p. 655, 2nd edit.; *ib.* No. XXII., clause 12, p. 745, 2nd edit.) Under a bequest of medals, current coin, if kept with the medals, will pass as such; but ornaments of the person, as jewels, &c., will not pass under a bequest of a cabinet of curiosities, notwithstanding such ornaments have been kept together, and shown with the curiosities: (*Cavendish* v. *Cavendish*, 1 Bro. C. C. 469.) It appears that under a bequest of a silver tea-kettle and lamp, with the appurtenances, the kettle and lamp will pass, and also the box in which it is kept; but this will not include a silver tea-pot commonly used with it: (1 Eq. Ca. Abr. 201; Pl. 13.)

As to farming stock, live and dead stock, &c.]—The term "farming stock," will include the live and dead stock of the farm, and also crops of growing corn: (*West* v. *Moore*, 8 East, 339.) But it seems the construction of the terms, "live and dead stock," will depend upon the other words with which it is associated; if annexed to things used for the domestic purposes of the house; as where inserted amongst a bequest of household furniture, wine, liquors, &c., it will include in-door stock only, but if coupled with what usually forms part of the out-door stock, then the out-door live and dead stock will be considered to have been intended: (*Gower* v. *Gower*, Ambl. 612; see the form of a general bequest of farming stock, Vol. II., Part VII., No. XL., clause 3, p. 682, 2nd edit.)

Stock in trade.] — A general bequest of the testator's stock in trade will include shop goods and utensils in trade, and, according to the opinion of Price, J., money in a till will pass under those terms: (*Seymour* v. *Repier*, 1 Bur. 29; see the form of a general bequest of stock in trade, 2 Con. Prec., Part VII., No. XXXVIII., clause 4, p. 485, 2nd edit.) In wills of traders it is not unfrequent that the testator devises his business to some member of his family or some other favoured person, or where he has the power under a partnership deed, appoints him as his successor in such business, with all the rights and privileges he is entitled to confer therein. When this occurs it is also the regular course to bequeath the testator's share in the concern, as also in the stock in trade. Added to which it is advisable to constitute him a special executor as to all matters relating to the business, so as to enable him to act effectually in all matters connected therewith, independently of the other executors of the will: (see the form 2 Con. Prec., Part VII., No. XXXVIII., pp. 844, 845, 2nd edit.)

As to things of a collective and fluctuating nature.]— Where the subject-matter of the bequest consists of things of a collective and fluctuating nature, as household furniture (*Masters* v. *Masters*, 1 P. Wms. 421), a collection of pictures (*Dean of Christchurch* v. *Barrow*, Ambl. 461), a flock of sheep, a service of plate (Plow. 343), or a library of books, any subsequent additions would always pass under a bequest of any of these things, notwithstanding the terms of the bequest were particular as to place and time, the will, as to property of this kind, not being considered to speak until the testator's death, as, in fact, it now does under the act 1 Vict. c. 26, with respect to property of every kind and description, in every case in which the will does not in express terms declare a contrary intent.

What will be comprehended under the term "money."]— Where a testator expresses a desire to bequeath his money to any particular person, or in any particular manner, it must be ascertained whether he intends to use the term in its most comprehensive sense, or to restrict it to ready money in his possession or in his banker's hands, and the bequest must, of course, be penned accordingly. The word "money," standing singly and unexplained by the context, will comprehend cash, bank notes, money at the bankers (*Hertford* v. *Lowther*, 7 Beav. 1; *Heming* v. *Whitam*, 2 Sim. 493), notes payable to bearer, exchequer bills, and

bills of exchange indorsed in blank; but promissory notes *not payable to the bearer* will not pass under that term. The reason of the distinction is, that exchequer bills, and bills of exchange indorsed in blank, are not considered as choses in action, but as the money of the persons in whose possession they are (*Kendall* v. *Kendall*, 4 Russ. 360, 370), whilst promissory notes not payable to bearer are regarded as mere choses in action, and therefore incapable of passing to a legatee by the term money. The same rule holds with respect to stock in the public funds (1 Tur. & Russ. 266; *Willis* v. *Plaskett*, 4 Beav. 208), Long Annuities and Columbian bonds: (*Beales* v. *Crisford*, 13 Sim. 592.) When the word "ready" is annexed, the term money becomes of much more restricted import; for then, although it will pass all the ready money in the testator's or his banker's hands, it will not, it seems, include money in an agent's hands, the produce of effects sold by the testator: (*Smith* v. *Butler*, 1 Jones & Lat. 692.)

Securities for money.]—Bills of exchange, promissory notes, bond and mortgage debts, will pass by the words securities for money, as will also stock in the parliamentary stock or public funds (*Bescoby* v. *Pack*, 1 Sim. & Str. 500); but it seems doubtful if this would include Bank stock, that being a species of property wherein the owner is interested as a partner in a public trading company.

Whether a mortgage in fee will pass under a bequest of securities for money.]—The question as to whether the legal estate in a mortgage will pass under the words "securities for money," has proved a most perplexing one, having formed the subject of much controversy, and the decision in each individual case seems rather to have been founded upon some other expressions contained in the will, explanatory of the way in which the testator meant the term "securities for money" is to be construed, than from the import those words would have received if standing simply and alone, unaided by any other words, or by the context of the will: (*Galliers* v. *Moss*, 9 B. & C. 276.) The most general rule of construction seems to have been guided by the words of limitation, where any such were used, that were annexed to the bequest. Thus, for example, a bequest of securities for money limited to trustees, their "*executors*, administrators, and assigns," would negative the intent to pass the fee, because limited in a course of representation through which estates of inheritance are incapable of being transmitted. But if

limited to a man and his "*heirs*," or to a man, his heirs, executors, and administrators, the word "*heirs*," annexed to the devise in the one case, and preceding the limitation of the personal representatives in the other, has been considered a sufficient intent to pass the legal fee under a devise of "securities for money," and this, it seems, notwithstanding it may be coupled with bequests of personal estate: (*Barber* v. *Symons*, 2 Bing. 454.)

Practical suggestions.]—The best, and in fact the only proper course, is so to pen the will as if possible to prevent any question whatever from being raised upon the subject; and whenever it is ascertained, or there is any reason to suppose, a testator has any estates vested in him as a mortgagee, to make a specific disposition of such mortgaged estates in the manner we have previously suggested.

As to shares in public companies, stock in the funds, &c.]—When a testator is possessed of any shares in public companies, such as bridge, navigation, or railway shares, or shares in mines, or any other undertaking, or in any of the public stocks or funds, it must be ascertained whether or not he intends the bequest of them to be specific, so as to fail of effect, either *in toto* or *pro tanto*, by his subsequent disposition of such shares; or whether he wishes the bequest to be a general one, so that the legatee shall have the benefit of it at all events, either by other shares being purchased for him, or the value, if they have been realized; and the testator's actual intention in these matters having been ascertained, the bequest should be penned accordingly.

As to stock in the public funds.]—With respect to stock in the public funds, unless the will contains some expressions to denote a contrary intent, a bequest of so much stock; as, for example, the sum of 1000*l.* Three per Cent. Consols, has been construed as expressive of the quantity of stock the legatee is to take under the will, and as a direction, in case the testator should not happen to die possessed of a sufficient amount of stock to satisfy the bequest, that his executors should purchase sufficient stock of the same kind to make good the deficiency: (*Partridge* v. *Partridge*, Cas. temp. Talb. 157.) Still nice questions have arisen as to what expressions will be sufficient to denote a contrary intent, and thus render the bequest a specific one. Where bequests of this kind have most frequently been construed to be specific, has been where the word "my"

has preceded the word "stock," or the description of the testator's shares in any public companies, as, for example, "*my* capital stock in the East India Company" (*Ashburner* v. *M'Guire*, 2 Bro. C. C. 112); or "1000*l.* in *my* stock, or part of *my* stock," or all *my* shares in the Grand Junction Canal Navigation (4 Ves. 750; 1 Eq. Ca. Abr. 302), which has been holden to render the bequest specific: (*Hayes* v *Hayes*, 1 Kee. 97.) Still the mere possession by the testator, at the date of his will, of shares in stock or in any public companies, of equal or greater amount than the bequest, will not, without words of reference, or an intention appearing on the face of the will that he meant the identical stock of which he was possessed, make the bequest specific: (*Robinson* v. *Addison*, 2 Beav. 515.) But if the bequest be accompanied with a direction to sell out the stock it will render it so (*Ashton* v. *Ashton*, 3 P. Wms. 384), for it is more reasonable to impute to the testator an intention that his trustees, or personal representatives, should sell the stock which he had when his will was made, than that they should, after his death, purchase similar stock for the purpose of immediate sale, which they must make if they acted according to the letter of the will. And if the words of the will are sufficient to denote an intention in the testator to bequeath the particular stock, it will make no difference whether the bequest be made of the whole fund, or of fractional portions of it; for in either case the bequest will be specific: (*Sleech* v. *Thorrington*, 2 Ves. sen. 561.)

Practical suggestions.]—In order, however, to prevent the possibility of questions arising at any future period, if the testator really intends the bequest of his stock to a specific one, and that the legatee is to take his legacy from the identical fund only, with all its incidents and liabilities, the identical stock should not only be distinctly specified and set forth, but it should be also expressly stated that the bequest is to be considered as a specific one; yet if, on the other hand, as is almost universally the case, the testator intends the bequest shall not be adeemed or diminished by a subsequent sale, either of the whole, or some portion of the stock, it will be advisable to annex to bequests of this kind a direction, that if the testator is not, at the time of his decease, possessed of the said several sums in the said stocks or funds so bequeathed by him, his executors shall make good the deficiency by purchasing so much in the said funds as will make up the amount to the current price of the stock at the time of his decease: (see the form

2 Con. Prec., Part VII., No. XVI., clause 9, pp. 709, 710, 2nd edit.) And whenever stock of any kind is intended to be disposed of, it should be described as such in the will; for stock in the public funds will not pass under the general term money, which term will always be read in its strict literal meaning, unless the context of the will discloses a different intent: (*Lowe* v. *Thomas*, 23 L. T. Rep. 238; see forms of bequest of stock, 2 Con. Prec., Vol. II., Part. VII., No. XVI., clauses 6, 7, and 8, p. 709, 2nd edit.)

Debts.]—Where the subject-matter of the bequest is a debt, whether secured by mortgage, bond, or simple contract, if the testator designs the legatee to have the debt, or the money to be produced therefrom, and no more, the debt and security should be so specifically described as to enable either the legatee or the executor to say that is the identical subject and no other which the testator has bequeathed by his will. But if, as is generally the case, the testator intends the legatee shall have the amount secured at all events, it will be necessary to declare, that in case the debt is paid off in the testator's lifetime, the amount of the sum secured shall be paid to the legatee in lieu thereof: (see the form 2 Con. Prec., Part VII., No. XXXVII., clause 13, p. 842, 2nd edit.) Where a debt due to the testator is to be released to a legatee, the amount should be set out, as also the nature of the security, if any such has been given: (see the form 2 Con. Prec., Part VII., No. XXII., clauses 20 and 21, p. 746, 2nd edit.) And whenever it is intended that the debtor's representatives are to have the advantage of the bequest, in case he should happen to die in the testator's lifetime, the benefit of the release should be extended to the debtor's representatives; for, it seems, a release to the debtor only would lapse if he were to die before the testator: (*Toplis* v. *Baker*, 1 P. Wms. 86.) And even where a testator released and forgave to A. B. the sum of 500*l.* upon his bond, and directed the bond to be delivered up to him to be cancelled; it was held that the will did not import a general release; and that the benefit of the release lapsed by the death of the legatee before the testator: (*Izon* v. *Butler*, 2 Pri. 34.) It is proper also to observe, that a release of a debt is so far viewed in the light of a specific bequest as not to be subject to abatement on a deficiency of assets.

Where a legacy is intended to operate as a satisfaction of a debt.]—Where a legacy is to be bequeathed to a party to

whom the testator is indebted, it should be stated whether or not the bequest is intended to operate as a satisfaction of the debt: (see the form 2 Con. Prec., Part VII., No. XXII., clause 22, p. 747.) As a general rule, where a person indebted to another bequeaths to him as great, or a greater sum of money than the debt, and whether such debt be or be not mentioned in the will, the bequest of the legacy will operate as a satisfaction of the debt (*Gaynor* v. *Wood*, Dick. 331), unless there are some expressions in the will by which it can be shown that the testator designed to confer a benefit as well as to satisfy a claim. Still, as the rule which construes a bequest to operate as a satisfaction of a debt is not looked upon in a favourable light, whenever there is no deficiency of assets, the courts are not unwilling to lay hold of any little circumstances which will take the case out of the strict application of the rule, and thus enable a testator to be generous as well as just. Hence, a bequest of property of a different nature from the debt will be sufficient to repel the inference of satisfaction; consequently, as money and lands are things of a different nature, a gift of the one will not be taken to be a satisfaction of the other (*Forsyth* v. *Grant*, 1 Ves. 298), neither is a bequest of a legacy an extinguishment of a negotiable security: (*Carr* v. *Eastabrook*, 3 Ves. 594). Nor will a debt due on an open and running account be deemed satisfied by a bequest of a legacy; for at the time the testator gave the legacy he might not have been aware that anything whatever was owing from him to the legatee, and therefore no inference can arise that he meant the legacy as a satisfaction of a debt which he did not know to have any existence: (*Thomas* v. *Bennett*, 2 *ib*. 342.) Upon this principle also a legacy is no satisfaction of a debt contracted subsequently to the will: (*Cranmer's case*, Salk. 508.) Nor will legacies to servants to whom wages are due be deemed as a satisfaction of those claims: (*Richardson* v. *Crease*, 3 Atk. 69.)

Essentials to make a legacy operate as a satisfaction.]— In order also that a legacy may operate as a satisfaction it must be at least equal in amount to the debt, for if less it will not operate as a satisfaction even *pro tanto*: (*Eastwood* v. *Vincke*, 2 P. Wms. 616.) It seems, however, that if any specific article, such as a piece of art or curiosity, a fine picture or the like, be bequeathed in *express* satisfaction of a debt, and be accepted as such by the creditor, it will be treated as a satisfaction, notwithstanding it should eventually turn out that the gift was of less value than the debt: (*Byde* v.

Byde, 1 Cox, 49.) To operate as a satisfaction the time of payment of the legacy must be equally certain as the debt (*Richardson* v. *Grease*, *sup.*); and there must also be equal certainty of payment; therefore a legacy on a condition or contingency will never be construed as a satisfaction: (*Nicholls* v. *Judson*, 2 Atk. 301.) The fund also must be equally beneficial to the creditor, and for this reason a residuary bequest cannot be considered a satisfaction on account of the uncertainty of the amount: (*Devise* v. *Pontet*, Pre. Cha. 240.)

How far a legacy will operate as a satisfaction of a child's portion under a marriage settlement.] — With respect to legacies operating as a satisfaction of children's portions, secured to them by their parents' marriage settlement, a different rule prevails than in the case of creditors; for, as we have just before noticed, a bequest of a legacy of a less amount than the debt will not even operate as a revocation *pro tanto*; whereas, in the case of portions, although the bequest is not equal in amount to the portion, it will, nevertheless, be a satisfaction in part: (*Jesson* v. *Jesson*, 2 Vern. 255.) Neither, it seems, will a difference in the time of payment of the legacy be sufficient to repel the presumption of satisfaction, and in such case the children will be put to their election to take either their portion or their legacy (*Bruen* v. *Bruen*, 2 Vern. 439), although an infant will be allowed until he attains twenty-one to make his election. Still, in order that the bequest may operate as a satisfaction, its eventual payment must be as certain as that of the portion itself, and it must also be of the same nature; consequently a devise of real estate is no satisfaction of a money portion, neither is a bequest of money a satisfaction of a settlement of land: (*Bengough* v. *Walker*, 15 Ves. 512.) Nor will contingent legacies be a satisfaction of absolute portions; and if the bequests are given with a view to some other purpose than the portions were designed for, they will not be construed to be in satisfaction for such portions.

Whether legacies are to be considered as specific charges upon certain specified funds, and thus so far acquire the nature of specific legacies as to be dependent on the existence of those funds for discharging them; or whether such funds are to be considered as the primary source of payment only, which failing, they are to be paid out of the testator's general estate, is a subject we must defer entering upon until we come to treat upon charges for the payment of debts and legacies, which will be fully discussed hereafter.

As to general pecuniary legacies.]—When the legacies are intended to be merely general pecuniary legacies, payable generally out of the testator's personal estate, it will be proper to state them to be of sterling money; still, this will only be proper where they are to be so paid; for if, as often happens, they are payable out of colonial property, or in any foreign currency, the bequest must be penned acordingly; and here it may be proper to remark, that where a testator who has property both in England and abroad bequeaths general legacies, but postpones their payment until property belonging to him abroad is remitted to this country and realized and invested in the English funds, the postponement will not render the bequest specific, so as to depend upon the circumstance of the testator having at the time of his death sufficient property abroad to transmit for realization and investment: (*Sadler* v. *Turner*, 8 Ves. 617.) And even where a testator having property both here and abroad bequeaths legacies to persons residing in each place, directing at the same time that they shall be paid out of the assets in the respective countries, this direction will not make the legacy specific, and thus confine each class of legatees to the funds of the country in which they happen to be resident, but the whole of the assets, whether in this country or abroad, will be liable to their demand; the testator's direction being, in fact, nothing more than the law would have done if he had been altogether silent on the subject: (*Kirkpatrick* v. *Kirkpatrick*, cited, 4 Ves. 624.)

Advantage of giving a legacy of nineteen guineas over a bequest of 20*l.*]—Where small pecuniary legacies are given to strangers, and particularly in the case of legacies to servants, where the intention is to give them a sum bordering upon 20*l.*, the practice is to limit the sum to nineteen guineas, which is the highest sum that can be bequeathed by will without its being subjected to legacy duty, which, in all cases where the legatees are strangers in blood (and natural children also are so considered), would be 10*l.* per cent.; consequently, if a bequest of 20*l.* is made to a party so circumstanced, he will actually receive 1*l.* 19*s.* less than he would have done if a legacy of nineteen guineas only had been given him: (see forms of legacies of this kind, 2 Con. Prec. Part VII., No. XV., clauses 4 and 5, p. 705, 2nd edit.)

Testator authorized to give a legacy free of legacy duty.]—A testator may, however, if he pleases, give a legacy free

of all legacy duty whatever; but to do this, he must expressly direct that it is bequeathed free of all legacy duty. This direction may be annexed to the bequest; but, where several legatees are to be equally benefited in this way, the better plan is, after making the several bequests to the respective legatees, to direct in one single clause that all the said three or four legacies, according to the number there may be, shall be paid to the respective legatees thereof free from all legacy duty whatsoever: (see the form 2 Con. Prec., Part VII., No. XXIV., clause 11, p. 765, 2nd edit.)

III. Of the Residuary Clause.

What will be included under a general bequest of the residuary.]—A residuary bequest will operate on the whole personal estate of the testator undisposed of by him after his debts and legacies are paid (*Morgan* v. *Morgan*, 5 Mad. 412); or which, being disposed of, becomes part of his personal estate, either by lapse (*Duke of Marlborough* v. *Godolphin*, 2 Ves. 83), forfeiture, or otherwise: (*Jackson* v. *Kelly*, 2 Ves. 285.) And the same rule prevails notwithstanding the words in the residuary clause are "the residue not before disposed of;" for the residue of personal estate is of nothing fixed, but of a fluctuating interest; and if the personal estate is increased by any event after the death of the testator, it is part of the residue, and will pass as such, and so will the interest of that residue, for the interest is assets, and part of the estate: (*Green* v. *Ekins*, 2 Atk. 476.) But if the bequest of any part of the residue itself should fail by lapse, in consequence of the death of any of the residuary legatees in the testator's lifetime, the survivors will not be entitled to those shares, unless the residue is bequeathed to them in joint tenancy, or there is a provision for survivorship and accruer, which should always be inserted where the testator intends the residuary legatees should have that benefit conferred upon them, and which, in the absence of an express provision to that effect, will become distributable according to the Statute of Distributions: (*Bagwell* v. *Dry*, 1 P. Wms. 700.)

Residuary bequest may be restricted to some particular portions of testator's property.]—But notwithstanding a residuary bequest is, generally speaking, considered to comprise the whole personal estate not previously disposed of, there is nothing to preclude a testator from restricting its import to some particular portions only of his testamentary pro-

perty, if he makes use of proper expressions to denote that intent (*Sadler* v. *Turner*, 8 Ves. 607); as where a testator having excepted various articles out of his will, which he thereby declared he intended to dispose of by a codicil, the excepted articles were held not to pass in the residuary clause in the will, and that the testator having failed to dispose of them by the codicil, they belonged to the next of kin: (*Davies* v. *Davies*, 3 P. Wms. 40.) A residuary bequest may, by the aid of a context, be confined to a particular description of property, or to funds in a particular place. Hence the words "what is left," applied to the subject previously disposed of, have been confined to that subject, and not extended to the general residue. And where a bequest was of "the small residue which shall be left to my executors," it was held that lapsed legacies to a considerable amount should not pass as part of the specified residue: (*Page* v. *Leapingwell*, 18 Ves. 330.)

Effect of residuary clause upon devises of real estate.]—Previously to the Wills Act, 1 Vict. c. 26, there was a distinction between the effect of a residuary clause upon a lapsed devise of lands and a lapsed legacy of personal estate; a residuary clause, however general in its terms, being incapable of embracing a lapsed devise of real estate. The reason of this distinction was, that every devise of lands was specific, which extended to a residuary devise as well as to any other, and could not embrace lands which did not answer that description of residuary estate at the time the will was made: (*Hill* v. *Cook*, 1 Ves. & Beav. 175.) But this distinction has been removed by the statute above referred to, which expressly provides that a residuary devise of real estates shall include estates comprised in lapsed and void devises: (sect. 25.)

Where the executors are to have the residue beneficially.]—And here it may be proper to observe, that whenever a testator designs that his executors shall take the residue for their own benefit, it will be necessary to bequeath it to them in terms sufficient to show that intent; for unless it be expressly bequeathed to them, or the will contains some expressions by which such intent may be reasonably inferred, the executors will take no beneficial interest whatever in the residue, which, if not otherwise disposed of, they will be held to take as trustees for the person or persons (if any) who would be entitled to the testator's personal estate under the Statute of Distributions. Formerly the law was

otherwise, and as the whole personal estate vested in an executor by virtue of his office, it was considered that the surplus which remained, after payment of funeral and testamentary expenses, debts, and legacies, he was entitled to retain for his own private use. But by the statute 11 Geo. 4 & 1 Will. 4, c. 40, after reciting that testators by their wills frequently appointed executors without making any express disposition of the residue of their personal estate, and that execctors so appointed become by law entitled to the whole residue of such personal estate; and that courts of equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been the testator's intention to exclude them from the beneficial interest therein, in which case they are held to be a trustee for the person or persons (if any), who would be entitled to the estate under the Statute of Distributions if the testator had died intestate, proceeds to enact, that when any person shall die after the first day of September next after the passing of this act, having by his or her will, or codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would have been entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors, was or were intended to take such residue beneficially: (sect. 1.)

Act not to affect rights of executors where there is not any person entitled to the residue.]—But by the second section of the above-mentioned statute it is enacted, that nothing therein contained shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of residue not expressly disposed of.

CHAPTER V.

OF THE ESTATES AND INTERESTS TO BE CREATED BY WILL.

I. AS TO ESTATES IN FEE SIMPLE.

1. As to terms descriptive both of the subject-matter of devise and of the testator's interest therein.
2. When untechnical words will be construed according to the sense in which it is manifest the testator intended to employ them.
3. When an estate in fee may arise by implication.
4. A charge on real estate passes the fee.
5. Where a testator directs an act to be done which a life estate might prove insufficient to accomplish, it will pass the fee.
6. The fee will pass whenever it appears that the testator intends the beneficial interest shall be enjoyed for as extensive a period as the legal estate.
7. Where the devisee has an absolute power of disposition conferred upon him.

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I. As to Estates in Fee Simple.

1. As to terms descriptive both of the subject-matter of devise and of the testator's interest therein.
2. When untechnical words will be construed according to the sense in which it is manifest the testator intended to employ them.
3. When an estate in fee may arise by implication.
4. A charge on real estate passes the fee.
5. Where a testator directs an act be done which a life estate might prove insufficient to accomplish, it will pass the fee.
6. The fee will pass whenever it appears that the testator intends the beneficial interest shall be enjoyed for as extensive a period as the legal estate.
7. Where the devisee has an absolute power of disposition conferred upon him.

1. *As to terms descriptive both of the subject-matter of devise and of the testator's interest therein.*

As the law stood formerly a simple devise of real estate descriptive merely of the subject, as of a house, a field, or a piece of land, would have passed no more than a life interest, unless the proper words of limitation had been annexed to the gift, or some expressions were connected with it, by which an intent to have passed a larger estate could have been disclosed. Still a more liberal construction was allowed in the case of a will than a deed, because instruments of the former kind were often made in haste, and sometimes even when the party was *in extremis*, and unable to obtain that professional assistance of which a party to a deed had so many opportunities of availing himself; hence, where a

clear and manifest intent has been disclosed by the terms made use of by the testator, an estate in fee has been allowed to pass without any words of inheritance, and an estate tail without any words of procreation, and even estates have been allowed to arise by mere implication, without any words of express devise whatever, where, from the context, it has appeared that such must have been the testator's real intention. In some instances also real property might, and, in fact still may, pass where the intention is apparent, without any mention whatever being made of it; as where one man by will appoints that another shall be his heir: (*Marrett* v. *Sly*, 2 Sid. 75.) But in a deed the law always was, and so it still remains, that a limitation of lands to a man without words of limitation, will confer no more than a mere life estate (Co. Litt. 112), with only the single exception in the now obsolete case of a gift in frank marriage, which would have raised an estate tail: (Wood's Inst. 120.) But no other gift or grant, even though it were expressive of the estate the grantor actually designed to give, as to a grantee in fee simple, would confer anything beyond a life estate.

The instances in which the courts have allowed a fee to pass by will, where the regular words of limitation have been omitted, have been—

First, where the subject-matter of devise has been so described as to embrace not only the property itself but also all the testator's estate and interest therein.

Secondly. Where the words of limitation employed, although not strictly technical, are still sufficient to show the sense in which the testator intended they should be construed.

Thirdly. Where the intent was manifest, although the will contained no words of devise whatever.

Fourthly. Where the lands were devised subject to a charge, or the devisee of them was directed to forgive or forego any benefit.

Fifthly. Whenever a testator directed any acts to be done by the devisee or devisees, which a mere life estate might have been insufficient to enable such devisee or devisees to perform.

Sixthly. Where the legal estate is devised in fee, and it appears the testator's intent was that the beneficial interest should be enjoyed for as extensive a period.

Seventhly. Where the devisee has an absolute power of disposition over the devised property conferred upon him by the will.

What terms would have passed the subject, and also all the testatŏr's interest in the devised premises.]—A learned judge once observed (Wilmot, J., in *Scott* v. *Allberry*, Com. 337), that whenever it plainly appeared that a testator intended to pass a fee, it is immaterial what words he made use of. Hence the word "estate," in an almost numberless list of cases, has been held to pass not only the property itself, but also all the testator's estate and interest therein (see the cases referred to, 1 Hughes Pract. Sales, p. 306, 2nd edit.); and although at one time it appears to have been contended that where a testator annexed a local description to the word "estate," it would have negatived the intent to pass the fee, it was nevertheless determined that adding a local description, as "my estate at A." or "of A." or "in A.," would not have restricted the import of the word estate to a mere local description of the property, or make it mean less than the absolute estate and interest which the testator himself possessed therein: (*Doe d. Chichester* v. *Oxenden*, 4 Taunt. 176; S. C., on appeal, 4 Dowl. 92; *Gardiner* v. *Harding*, J. B. Moore, 565.) Neither would an additional description annexed to the word "estate," as for example, "all that estate I bought of M." (*Bailis* v. *Gale*, 2 Ves. sen. 48); or "all that my freehold estate, consisting of thirty acres of land, more or less," (*Gardiner* v. *Harding*, *sup.*); or "all my estate, lands, &c., called or known by the name of the coal-yard, in the parish of St. Giles, London" (*Roe d. Child* v. *Wright*, 7 East, 259), have controlled its more extensive import. And whatever doubts may at one time have existed with regard to its construction when used in the plural number (*Goodwyn* v. *Goodwyn*, 1 Ves. sen. 236), it has long since been decided, that whether it be written "estate," in the singular, or "estates," in the plural number, it will receive exactly the same construction: (*Roe d. Allport* v. *Bacon*, 4 Man. & Selw. 366.)

When the import of the word "estate" may be restricted.]—But the word "estate," notwithstanding its extensive import, may nevertheless be restricted to a more limited meaning, where the will discloses that such must have been the testator's obvious intent. Hence, where he confines it to a life estate, a life estate and no more will be held to pass by it: (*Price* v. *Gibson*, 2 Eden, 115.) So where words importing a lesser estate than a fee have been annexed to the term, such limited interest only will pass under it; as where a devise was of a testator's estate at A., with limitations over in strict settlement: (1 Bro. & Bing. 123.)

When the term estate will be construed to relate to things of the same kind with which it is associated.]—The word "estate" may also be restricted to mean things of the same kind with which it is coupled or associated. If, therefore, it is coupled with articles of a personal nature, it will be considered to relate to personal estate only. Thus, where a testator, after a specific devise of an estate by its local description, devised "all the residue of his leases, mortgages, *estates*, debts, moneys, and other goods, &c.," the word estates was held to be confined to the chattels only: (*Wilkinson* v. *Merryland*, 1 Cro. Car. 447; S. C. 1 Eq. Ca. Abr. 178.) In another case also a limitation of "all other the rest, residue, and remainder of my estate," consisting of ready money, plates, jewels, leases, judgments, and mortgages was confined to the kind of property with which it was thus associated, and of which the testator expressly stated it to have consisted: (*Timewell* v. *Perkins*, 2 Atk. 102.) Still, for all this, the mere circumstance of the word "estate," being in the same sentence with an enumeration of chattels will not so inseparably connect itself with them as to deprive the term of its more extensive signification; for if it be inserted so as to precede the enumeration of the chattels, it will be construed to relate to real estate not previously disposed of: (*Tanner* v. *Morse*, 1 Cas. temp. Talb. 284.) And if inserted after such enumeration, the description of which was sufficient to comprehend the whole of the testator's personal estate, the construction will be the same, upon the principle recognized by Lord Chancellor Talbot in *Ibbetson* v. *Beckwith* (Cas. temp. Talb. 157), that if the words of the will be general, and taking the testator's words in one sense will make the will to be a complete disposition of the whole, whereas taking them in another there will be a chasm, they shall be taken in that sense which is most likely to be agreeable to his intention of disposing of his whole estate.

As to operation of Wills Act, 1 Vict. c. 26.]—It does not appear that the act of the 1 Vict. c. 26, by which it is declared, that, unless words of limitation or some expressions are employed denoting a contrary intent, an absolute estate in fee simple will pass by a simple devise of the property (sect. 18), has made any alteration in the construction of the word "estate;" because now, as previously, if annexed to a devise of real estate it will pass the fee, but yet words of limitation, or other expressions employed by the testator to denote a contrary intent, will control its

more extensive operation, and where explained by the context to mean mere personal estate, as no real estate can then pass under the term, it can of course create no estate or interest in any portion of the testator's real property.

The word "property" of similar import as the word "estate."]—It will be proper, however, to observe that the word "*estate*" is not the only term which has been held to embrace the whole of the testator's interest, as well as the subject-matter of devise; for the word "property," unless restrained by the context, has been held to be of equal force with the word "estate": (*Noel* v. *Hoy*, 5 Mad. 38.) Yet the word property, like the word "estate," when associated with things of a personal nature, will be construed to relate only to personal property, and in fact it seems the construction of the two terms are precisely similar in every respect, and may be treated as synonymous expressions.

What other terms have been conidered as capable of passing both the subject and the fee.]—With respect to other terms capable of passing both the subject and the fee, it has been held that the testator's absolute interest in a remainder, or a reversion, would have formerly passed, as it now undoubtedly will, under a devise containing either of these expressions (*Norton* v. *Ludd*, 1 Lutw. 755), as will also a devise of my moiety (*Doe d. Atkinson* v. *Fawcett*, 7 L. T. Rep. 283.) So also the terms "all my right, title, and interest" (*Cole* v. *Rawlinson*, 1 Salk. 234), or "all my part, share, and interest" (*Andrew* v. *Southouse*, 5 T. R. 592), or "all I am worth" (*Hurtep* v. *Brooman*, 7 Taunt. 81), or "all that I shall die possessed of, real and personal" (*Pitman* v. *Stevens*, 15 East, 505; *Wilee* v. *Wilee*, 7 Bing. 664; *Thomas* v. *Phelps*, 3 Russ. 348), or "whatever else I have in the world not before disposed of," have been held to pass an estate in fee simple in the property to which those terms were applicable. At the same time it must be observed, that none of the above expressions have been held to pass the fee unless they were contained in the devising clauses of the will. If inserted only in the introductory clause, they would not have varied the construction of a devise afterwards made, where the expressions in the devising clause were insufficient to carry the degree of interest contended for: (*Right* v. *Sidebottom*, Doug. 734.) And notwithstanding, as we have just before observed, the fee simple in an estate in remainder or reversion would have

passed by a devise under either of those terms, yet the usual words, "rest, residue, and remainder," as relating to residuary property undisposed of by the will, would have been incapable of enlarging any devise of real estate to which it might have related, beyond the life estate which the devise of the subject itself would otherwise have conferred: (*Doe Snell* v. *Allen*, 8 T. R. 147.) But in this respect the law is now altered by the Wills Act, 1 Vict. c. 26, under which the devise of the subject will pass the fee or other absolute interest of the testator therein, unless some restrictive terms are employed, or some other expressions inserted in the will, denoting a contrary intent: (sect. 28.)

Import of the words "inheritance," "fee simple," &c.]—The word inheritance would have passed the fee (*Purefoy* v. *Rogers*, 2 Saund. 288), as would also a devise "to hold in fee," or in fee simple (*Baker* v. *Raymond*, Anders. 51); but the words hereditaments, although, strictly speaking, applicable to estates of inheritance, would not, prior to the act 1 Vict. c. 26, have extended the devise beyond a life estate (*Doe d. Palmer* v. *Richards*, 3 T. R. 356); neither would a devise of a house, or a farm, or a tenement, have been sufficient to pass more than a life estate, notwithstanding the word freehold had been joined to it (*Doe d. Ashley* v. *Barnes*, 2 Cr. Mees. & R. 23), although it is quite clear an estate in fee would now pass under a devise in those terms: (1 Vict. c. 26, s. 28.) But the word "all" standing alone, as in the following clause, "I devise all to my mother" (*Bowman* v. *Milbank*, 1 Lev. 149), has been considered too vague an expression to embrace any of the testator's lands, and would not now, it seems, any more than formerly, be capable of passing real property in any shape or form whatever.

Import of the word "effects."]—The word "effects" is a term of equivocal import, yet upon the whole more applicable to personal, than to real estate: (*Camfield* v. *Gilbert*, 3 East, 510.) Still, where the word "real," or "testamentary," is annexed to it, or if from the context of the will it appears that the testator intends to apply the term "effects" to real property, then not only the property itself, but also all the testator's interest therein will be comprehended by it; but when, as is usually the case, it is associated with chattels, its import will be confined to property of that description only. The construction of the term, therefore, does not appear to be affected by the Wills Act, 1 Vict. c. 26.

2. *When untechnical words will be construed according to the sense it is manifest the testator intended to employ them.*

There are certain instances in which words of limitation, although not technically correct, have been construed according to the intention in which it has been manifest the testator designed to employ them, and have been held to pass either a fee simple, or an estate tail, accordingly as such intention could be collected from the ordinary and general import of the terms that have been used. Thus, as we have just before remarked, a testator devising to a man in fee simple, or appointing him his heir, would in either case have passed the fee, as would also a devise to a man *in perpetuum*, or for ever (*Whiting* v. *Wilkins*, 8 Vin. Abr. 208); or to a man and his blood, for his blood runs through the collateral as well as the lineal heirs (Co. Litt. 6; 2 Prest. Estates, 84), but whether a devise to a man and his posterity would have passed an estate in fee simple, or in tail, still remains undecided; though it seems a devise to a man *et semino suo* will pass an estate tail: (*ib.*)

Distinction between the construction in a deed or in a will, where the term "heir," or "heirs," is used in an untechnical form.]—A limitation to a man and his heir in the singular number, or to a man or his heirs (*Snell* v. *Read*, 2 Atk. 645), if contained in a will, passes the fee, although the same terms, when used in a deed, will convey no more than a life estate (*Chapman* v. *Dalton*, Plow. 286); whilst a limitation to a man, his heirs, male or female, which in a deed passes an estate in fee simple (*Abraham* v. *Twigg*, Cro. Eliz. 478), in a will creates an estate tail: (*Denn* v. *Slater*, 5 T. R. 434.) But here we must observe, that notwithstanding the liberal construction that is permitted in the construction of wills for the purpose of carrying out the real intention of the testator, he will not be permitted, by whatever expressions he may have adopted, to contravene any fixed rules of law, and impose a course of descent inconsistent with an estate in fee simple, limited by the technical words properly adapted to the creation of that estate; hence, if he were to devise lands to A. and his heirs for their lives, the entire fee simple will vest in A., and the limitation to his heirs would be rejected for repugnancy, because there cannot be a succession of heirs for life estates: (*Doe* v. *Stenlake*, 3 East, 515.)

Where a limitation over, after a limitation in fee, may be

good.]—But a limitation over, after a limitation to a man and his heirs, although void in a conveyance at common law, may nevertheless be good in a will by way of executory devise, where the contingency upon which it is to take place is such as must necessarily happen in the course of twenty-one years after a life or lives in being; but unless restricted within these limits, it will be void for remoteness, and the first limitation in fee will confer an absolute interest; except in those instances where the contingency upon which the limitation over is to take effect is the indefinite failure of issue in the party to whom, and to whose heirs, the lands are first limited; for in that case the limitation over upon the indefinite failure of issue will cut down the preceding fee simple to a fee tail, and limitation over become a vested estate in remainder expectant thereon; but if the dying without issue is confined to the time of the death of the first taker, then he will take an estate in fee, and the limitation over will operate as an executory devise. This distinction has caused much controversy upon the construction of wills, as to whether the context shows that the limitation over is to take effect after an indefinite failure of issue, or whether it is to relate to the first taker leaving any surviving issue at the time of his death; as also what terms are necessary to express the default of issue to mean an indefinite failure of issue.

Old rule of law respecting the construction of dying without issue.]—Previously to the Wills Act (1 Vict. c. 26), a devise to a man and his heirs, with a limitation over, in case he should die without issue, or without leaving issue, or in case he should depart this life and leave no issue (*Forth* v. *Chapman*, 1 P. Wms. 663), unless there were some other expressions in the will to show the testator intended to restrict the term of dying without issue to the lifetime of the party, would have been construed to mean indefinite failure of issue, and the first taker would have taken an estate tail, and the limitation over would, as we have just before observed, have taken effect as a remainder expectant on the determination of such estate tail: (*Raggett* v. *Beattie*, 5 Bing. 243.) But with respect to the construction of wills made since the above-mentioned act has come into operation, considerable doubt has been thrown by the 29th section, which enacts that in any devise of real or personal estate, the words "die without issue," or "without leaving issue," or "have no issue," "*or any other words which may import a want or failure of issue of any person in his lifetime, or at the time of his death, or*

an indefinite failure of his issue, shall be construed to mean a want or failure of issue in his lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, *by reason of such person having a prior estate tail, or of a preceding gift being without any implication arising from such words*, a limitation of an estate tail to such person or issue or otherwise; provided that this act shall not extend to cases where such words as aforesaid import, if no issue prescribed in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Probable modern rule of construction.]—Now, as the above-mentioned enactment confines the import of the terms "dying without issue," or "without leaving issue," to the death of the party, it seems necessarily to follow, upon the authority of the cases in which the dying without issue has been construed to relate to that period (*Stevens* v. *Glover*, Com. Pl. April 1845, MS.), that if the preceding words were sufficient to pass the fee, a limitation over, upon dying without issue, contained in a will within the scope and operation of the Wills Act of 1 Vict. c. 26, would not, as formerly, create an estate tail, but an estate in fee simple, subject to a limitation over by way of executory devise, depending upon the contingency of the first taker leaving no issue behind him at the time of his death.

Where the limitation over is upon the party dying without heirs.]—It may be proper also to remark in this place that the act, 1 Vict. c. 26, is altogether silent upon the question of a limitation over upon a dying without heirs generally, of the party to whom and to whose heirs the premises have been previously limited, which being an event beyond the limits which the law allows an executory devise to take place in, would, it seems, be void for the remoteness, and the first taker's estate would thereby become absolute. The only exception to this rule seems to be where the person to whom the limitation over is made is a relation of, and in that character capable of being the collateral heir of the first devisee, for in that case the first devisee would be construed to take an estate tail only, and then the limitation over would be good as a remainder; because the limitation denotes that only lineal heirs could possibly have been

intended, as it would be impossible for the devisee to die without heirs so long as the remainder man or any of his issue existed: (*Morgan* v. *Griffiths*, Cowp. 224.)

3. *When an estate in fee may arise by implication.*

An estate in fee simple may arise by implication without any direct words of devise, either of the property itself, or of limitation of estate which the devisee is to take therein. This is sometimes caused by words of direct and immediate reference to other devises in the same will (*Wight* v. *Cundell*, 9 East, 400); or where a testator refers to a particular person as his heir, in which case, although he may be mistaken as to the actual fact, such reference will be sufficient to create an estate in fee simple by implication, although there are no words of direct devise to the party. Thus, in *Tilley* v. *Simpson* (3 Keb. 589), where a testator having issue by C. three daughters, S., A., and E., devised to C. for life all his freehold wherever, until S. his heir came to twenty-one, paying the heir 10*s*. during the term, and to the rest after fifteen years old 20*s*. a piece, and the heir to pay A. and E. 100*l*. a piece, 40*l*. at the decease of his wife, &c.; and if S. his heir died without an heir before twenty-one, so that the lands descended and fell to A. then A. was to pay E. &c.; Lord Hale, C. J. held that, notwithstanding the testator was mistaken in his intent that his eldest daughter was his heir, he nevertheless intended his lands should go according to his mistake, therefore, albeit there was no express devise to S., yet, she being named his heir, was sufficient to exclude the rest, and constitute her his sole heir: (see also *Taylor* v. *Webb*, Str. 301.) And if a testator should happen to refer to a disposition as having been made by him, when in fact he has not made any disposition at all, a devise by implication may still arise therefrom. Hence, where a testator bequeathed one moiety of, or term of, leasehold estates to E. G., and if she should die before twenty-one, to G. S.; and if she should die before a certain event, to another person, and after her death to A.; and provided that in case A. should die without issue, and E. G. or G. S. should be then living, or either of them, the said moiety of his leasehold messuages before given to the said A. should go to the said E. G. and G. S. Sir Thomas Sewell, M. R., said, that as there could be no doubt as to the intention, and the words of the gift being omitted by mistake, the court would supply them,

and imply a gift to A. and her issue, with a contingent limitation over: (*Bibin* v. *Walker*, Ambl. 661.)

Mere recitals will not generally operate as an actual devise.] —But generally speaking a mere recital of an intent to give, will not be allowed to operate as an actual gift, or even to a demonstration of an intent to give. Thus, where B., by his will reciting that he was entitled for life under the will of A. to the advowson and rectory of D., with remainders over, "subject to a direction in the said will that my brother J.W. shall be presented to the said rectory, when it shall next become vacant, which it is my wish may be complied with; now I hereby declare it to be my desire and earnest wish that in case, upon the vacancy of the said living, the said J. D. shall not be then living, or in case the said rectory shall again become vacant, after the said J. D. shall have been presented to and accepted the presentation, then A. P. was to be presented. The fact was, that under the will of A., J. D. was only entitled to the presentation on a contingency which had not happened. A question arose whether the expressions in the will of B. raised a gift by implication, so as to put the persons actually entitled under it to their election; and Lord Eldon, upon the grounds above alluded to, decided that it did not.

4. *A charge on real estate passes the fee.*

When a charge on real estate would have passed the fee.]— Even previously to the act of 1 Vict. c. 26, an estate in fee would have passed without any words of limitation being annexed to the gift, whenever the lands were devised to a person charged with the payment of a sum in gross (*Reed* v. *Halton*, 2 Mod. 25), or of debts, legacies (*Doe d. Palmer* v. *Richards*, 3 T. R. 356), or annuities (*Webb* v. *Hearing*, Cro Jac. 114), or whenever he was to give up or relinquish any benefit, or expend any money for the advantage of any other person; and in either of the above cases it was perfectly immaterial whether the charge bore any proportion or otherwise to the value of the devised property, or of the length of time for which the payment was to endure; a devise being always construed beneficially for the devisee, who might possibly have been prejudiced instead of benefited if he was to take no more than a life estate, by his estate determining by his death before he had time to receive out of the devised property the amount of the charges paid by him under the will. But in those cases

where the devisee could by no possibility have been a loser by defraying these charges, a less liberal construction prevailed, and he would have taken a mere life estate and no more; as where a devisee was only directed to pay out of the rents and profits generally, or when, or as, or after he had received them (*Doe d. Jackson* v. *Ramsbottom*, 3 Man. & Selw. 516); because in either of those cases he could have incurred no loss, or even run the slightest risk, as he was only to pay out of what he actually received; and for precisely the same cause, the rule was the same where the devisee was not to take until after the charges were satisfied: (*Goodtitle d. Paddy* v. *Maddern*, 4 East, 496.) But the law is now considerably altered in this respect by the Wills Act, 1 Vict. c. 26, by which a devise of the property is alone sufficient to pass the fee, so that if the property itself be sufficiently described, and the words of devise sufficient to pass it to the devisee, he will in either case take the fee, whether the devise be made to him subject to the charge, or he is not to take under until such charges are all satisfied (sect. 28), unless the will expresses a contrary intent.

5. *When a testator directs an act to be done which a life estate might prove insufficient to accomplish, it will pass the fee.*

What acts directed to be done will pass the fee.]—Where a testator directs any acts to be done which a life estate in the devisee might be insufficient to accomplish; as a devise upon trust for payment of debts and legacies for instance; an estate in fee simple has always been held to pass, and not merely an estate commensurate with the existence of the purposes of the will, or the objects of the trusts, which in many instances might be effected by an estate *pur autre vie* (*Beezeley* v. *Westerhouse*, 4 T. R. 89); and this construction has been confirmed by the Wills Act, 1 Vict. c. 26, by which devises of real estate to trustees or executors, except for a term or a presentation to a church, without any express limitation of estate, will be construed to pass the fee, or such other estate or interest as the testator had the power to dispose of by will, and not an estate determinable when the purposes of the trust are satisfied: (sects. 30, 31.)

Direction to sell passes a mere authority only.]—But where lands are simply directed to be sold, but are not directly devised to the trustees or executors to be sold, an authority to sell only, and no estate in the lands, will be held to pass

(*Lancaster* v. *Thornton*, 2 Burr. 1028); and, subject to the power of sale, the lands will descend upon the heir. The law, in this respect, does not appear to be altered by the Wills Act, 1 Vict. c. 26, which only mentions, "where any real estate shall be devised to any trustee," &c.

6. *The fee will pass whenever it appears the testator intends the beneficial interest shall be enjoyed for as extensive a period as the legal estate.*

Whenever the legal estate in the devised premises is limited to trustees in terms sufficient to pass the fee, and the expressions contained in the will are sufficient to denote an apparent intent that all the beneficial interest in the estate should belong to a particular person, or to a particular class of persons (which was generally inferred where the trust was declared generally in their favour without any restrictive terms), the fee in the trust has always been held to pass without the aid of any words of limitation whatever: (*Peat* v. *Powell*, 2 P. Wms. 194.) And in a case decided since the Wills Act, 1 Vict. c. 26 (*Malcombson* v. *Malcombson*, 17 L. T. Rep. 44), where A. devised certain freehold premises to B., to be kept in trust for C., "that is, B. to let the premises, and give the rent to my son C. for his support," and the question was, whether this passed the fee under the provisions of the above act, which gives the same estate to the *cestui que trust* as the trustee takes (sect. 30), the court held that the fee passed under these general words, consequently that both the legal and equitable fee passed to the devisee.

7. *Where the devisee has the absolute power of disposition conferred upon him.*

Where a power of disposition will pass the fee.]—It has been a long-fixed rule of law that where an absolute and uncontrollable power of disposition over the devised premises is given to the devisee, he will thereby acquire an estate in fee without the necessity of any words of limitation being annexed to the gift: (Latch. 36; Co. Litt. 96; *Whiston* v. *Clenton*, Leon. 156; *Goodtitle* v. *Otway*, 2 Wils. 6.) Still, a power of disposition would not have passed a fee where an express estate was given divided from the power; as where an express estate for life, in tail, or for any other limited interest, was given to the devisee, who had also an absolute power of disposition conferred upon him by the

will (*Cook* v. *Farrand*, 7 Taunt. 122), in which case the devisee was held to take merely the estate limited to him by express words, and the right in point of power, but not of estate, of disposing of the remainder. And it seems the act of 1 Vict. c. 26, would make no alteration in the law in the latter respect; for although no words of limitation are necessary under that act to pass the fee, this rule only holds where no contrary intention appears by the will, which is here clearly disclosed by the express limitation of estate to the devisee.

Where the preceding limited interest is given for the purpose of letting in estates of strangers.]—It seems, however, that, as well before as since the act of 1 Vict. c. 26, where an estate for life, or other limited interest is given. as a preceding estate to other estates in remainder, so as to let in estates to strangers either vested, as to A. for life with remainder to B. in tail (*Jennor* v. *Hardie*, 1 Leon. 283), or contingent, as to A. for life, and after his death without issue living at the time of his decease (*Goodtitle* v. *Otway*, 2 Wils. 6), with an absolute power of disposition, in case those remainders should fail to take effect, then upon failure of the mesne estates, the devisee will acquire the entire fee simple.

To pass the fee, power of disposition must be absolute and unrestricted.]—But the latter rule only holds where the power of disposition conferred upon the devisee, taking a limited interest in the property, is absolute and unrestricted; for whenever any particular mode of disposition is pointed out, as by deed, or by a deed or other instrument executed in some particular manner, or by will, the fee will not pass by force of a power so limited: (*Fisher* v. *Bank of England*, 13 Ves. 11.) But if, instead of an express estate being limited, the property is given to the devisee generally, which, under the act of 1 Vict. c. 26, will be sufficient to pass the fee to him, it seems that a power of disposition afterwards limited to him by the will, although restricted as to the mode in which such power is to be exercised, will not be sufficient to show a contrary intention, and the devisee will in such case take the fee accordingly, which he may dispose of either by making appointment according to the terms of the power limited to him by the will, or by any mode of assurance adapted to pass the estate in fee simple which he takes under the will independently of such power.

II. Practical Suggestions for Penning Devises in Fee Simple.

1. *Ordinary Limitations in Fee Simple.*

In all cases, as we have already remarked in a preceding part of this chapter, it will be better to adopt the proper technical expressions in preference to relying upon the liberal construction the law formerly allowed, or which has been conferred by the act 1 Vict. c. 26, and employ such words of limitation, as, according to the strict rules of law, have been considered to be properly adapted for the purpose. In devises of estates in fee simple, therefore, the lands should be limited to the devisee and his heirs, or to the devisee, his heirs and assigns; sometimes the property is limited to the devisee and his heirs, *To hold* to him, his heirs, and assigns for ever, but the long form of habendum, viz., *To have* and to hold, &c. commonly used in deeds, is rarely, if ever, employed in wills. It will often, however, be proper to insert a limitation to uses to bar dower, in order to exclude that right from attaching upon the widow of any devisee married prior to 1834; and this ought not to be lost sight of in practice, as it would generally turn out that the testator's intent really was that the devisee should take the devised property unfettered by any right of this kind: (see the form of a devise to uses to bar dower, 2 Con. Prec., Part VII., No. XXI., clause 1, p. 736, 2nd edit.) To this may be added the usual declaration to bar dower where an after-taken wife is intended to be also excluded: (*id. ib.* clause 2, p. 736.) But if the devisee was not married prior to 1834, and it is intended to exclude his widow from dower, the dower uses should be omitted altogether, and the simple declaration against dower only inserted. Still, before inserting either form, it should be ascertained that the testator really intends that the right of dower should not be allowed to attach upon the devised premises: (see further observations upon this subject, *ante*, vol. i., pp. 225, 228.)

2. *As to Limitations in Joint Tenancy.*

Where lands are devised in joint tenancy, the usual and most correct mode is to devise the lands to the devisees and

their heirs, "To hold unto and to the use of them, their heirs and assigns for ever," whenever it is intended to vest the legal estate in them, or "To hold to them and their heirs to the uses, &c. hereinafter declared," when it is designed that they are merely to serve the seisin to vest the use in other persons: (see the forms 2 Con. Prec., Part VII., No. I., clauses 1 and 2, p. 633, 2nd edit.; *id. ib.* No. II., clauses 1 and 3, pp. 641, 642; *id. ib.* No. III., clause 1, p. 644.) It is seldom, however, that a testator wishes to limit any devised property in joint tenancy amongst devisees who are to take beneficially under his will; but it is the best, as well as the universal practice, where property is devised to more than one trustee, to make them joint tenants, from the advantages it affords over a tenancy in common, by being transmissible to the surviving trustees in case any of them chance to die during the continuance of the trusts, instead of descending upon the heir of the deceased trustee, the inconveniences of which are so obvious as to render any observations upon that head in this place altogether superfluous.

3. *As to Limitations to Tenants in Common.*

Where property is devised amongst several devisees who are intended to take beneficial interest therein, the testator generally intends they shall take as tenants in common, and not as joint tenants; and this is so notorious a fact, that in modern times the courts, although the rule was formerly otherwise, have leant against the construction of a joint tenancy and in favour of a tenancy in common, and allowed words in a will to create a tenancy in common, which they would not have done in the case of a common law conveyance; hence, in a will, words importing a division have been held to create a tenancy in common, when they would not have done so if contained in a deed; as, "equally to be divided," (*King* v. *Rumball*, Cro. Jac. 441), or, "to two or more equally," (*Lewin* v. *Cook*, Cro. Eliz. 693), or "equally amongst them," or "equally to be divided between them," (*Blissett* v. *Cranwell*, 3 Lev. 371), or "part and part alike," (*Jaques d. Thoroughgood* v. *Collins*, Cro. Car. 95), or "share and share alike," (*Heath* v. *Heath*, 2 Atk. 121), or "to and amongst," (*Campbell* v. *Campbell*, 4 Bro. C. C. 15), or "respectively," (*Ettricke* v. *Ettricke*, Amb. 656), or other similar expressions. Still, words importing a division will not create a tenancy in common where the will contains an expression inconsistent with that construction; consequently,

whenever it has appeared that the testator designed that the share of any devisee who should happen to die should go over by survivorship amongst the other devisees, an estate in joint tenancy has been held to pass in order to carry out that intention, notwithstanding the will may have contained other words which would have created a tenancy in common. As, for example, in the case of *Armstrong* v. *Eldridge* (4 Bro. C. C. 215), where the testator devised the remainder of his estate to trustees to pay the rents and profits thereof to his four granddaughters *equally between them, share and share alike*, and their heirs respectively, and *after the decease of the survivor*, upon trust to pay the principal money to and amongst the children of his granddaughters; and upon two of his granddaughters dying without children, it was held that the living granddaughter took the whole by survivorship; for that notwithstanding the words "equally to be divided" and "share and share alike" were used, the whole context showed that a joint tenancy was intended, as the interest was to be divided amongst four whilst four were alive, amongst three whilst three were alive, and that nothing was to go to the children whilst any of their mothers were living: (*Trewen* v. *Rolfe*, 2 Bro. C. C. 220.) Still, there is nothing to prevent a testator from creating a tenancy in common, with benefit of survivorship, if he employs such expressions as will clearly indicate that intent; as, if he were to devise to three persons during their joint and several life and lives, and the natural life of the survivor of them, *to take as tenants in common, and not as joint tenants;* for a tenancy in common, with benefit of survivorship, is a case that may exist without a joint tenancy, because survivorship is not the only characteristic of an estate in joint tenancy: (*Doe d. Boswell* v. *Abey*, 1 Man. & Selw. 128.)

How will creating a tenancy in common should be penned.]—The most apt, concise, and technical form for creating a tenancy in common, is to limit the property to the use of the several devisees by name, and their respective heirs and assigns for ever in equal shares as tenants in common: (see the form 2 Con. Prec., Part VII., No. XXVIII., clause 6, p. 899.) In some of the old forms it was usual to add, "and not as joint tenants," but this addition is altogether superfluous.

Where there is to be a provision for survivorship.]—If it is intended that there shall be any benefit of survivorship or

accruer between the several tenants in common upon the happening of any contingent event, as the death of any one or more of them under the age of twenty-one years, or without leaving any issue at the time of his decease, and it is intended, as is almost universally the case, that they shall extend to the surviving or accruing shares, it will be necessary to insert an express clause to that effect; as the settled rule is, that on the decease of two or more devisees, the original shares only, and not those which have accrued to them by survivorship, will survive, without express words being inserted to denote such intention: (see the forms 2 Con. Prec., Part VII., No. XXVIII., clause 7, p. 800, 2nd edit.; *id. ib.* No. XXXV., clauses 7 and 8, pp. 830, 831; *id. ib.* No. XXVI., clauses 4 and 5, p. 834.)

III. As to Estates Tail, and Contingent, Conditional, and Executory Estates and Interests in Real and Personal Property.

1. As to estates tail and strict settlements.
    - *a.* Of the rule in Shelley's case.
    - *b.* What expressions will be allowed to supply the place of regular words of limitation.
    - *c.* When an estate tail may arise by implication.
    - *d.* As to cross-remainders in tail.
2. Quasi entails.

It is almost needless to remark, that the same terms should be employed to create an estate tail in a will as in a deed; still, with respect to instruments of the former kind, the courts, in order to effectuate the testator's intention, have allowed other words to supply the place of the regular words of limitation, viz., "heirs of the body," or even to permit a person to take in the character of tenant in tail, which he could not possibly have done if the lands had been conveyed by deed; as in the instance of a devise to a man and his heirs male, or to a man and his heirs lawfully begotten for ever (*Good* v. *Good*, 28 L. T. Rep. 266), which in a will creates an estate tail, but in a deed would pass the fee simple. In other cases, also, persons have been allowed to take under the description of "heirs of the body" in a will, which they could not possibly have done if the estate tail had been created by deed. Thus, for example, suppose lands are limited by deed to A. and the heirs of his body, who hath issue a daughter, who hath issue a son, and dies, there the land will return to the donor, and the son shall

not have it, because he cannot convey himself by heirs male, for his mother is a let thereto; but it is otherwise of such a devise, for there the son of the daughter shall have it, rather than the will shall fail: (Term de Ley, tit. Devise.) Sometimes, also, as will be pointed out hereafter, words of devise adapted to create an estate in fee simple may be restrained by other expressions in a will to mean heirs of the body, and thus pass an estate tail only. And in some instances, an estate tail has been allowed to arise by implication, without any direct words of limitation whatever.

a. Of the Rule in Shelley's Case.

In penning limitations of estates tail, and strict settlements of real estate, it will be important to keep the rule in Shelley's case constantly in view, of which it may not be improper to give in this place a brief outline. By this rule, whenever an estate for life is given to one generally, and afterwards in the same instrument an estate in remainder is limited to his heirs, or the heirs of his body, such subsequent limitation vests immediately in the ancestor, instead of remaining in contingency or abeyance until the determination of his preceding life estate. If the limitation be to his heirs generally, he will take an estate in fee simple; if to the heirs of his body, an estate tail. This rule, although always designated the rule in Shelley's case, was in reality an established rule of law long before that case was decided, in which it was not a subject for the determination of the court, or even of controversy, but is expressed in the arguments in clear terms as an acknowledged rule of law, and from thence is presumed to have received this appellation.

When the rule will apply.]—The rule will apply equally, notwithstanding an intervening estate for life or in tail be interposed between the estate of freehold of the ancestor and the subsequent limitation to his heirs; with this diversity, that where the devise is immediate, as to A. for life, remainder to the heirs, or the heirs of his body, it becomes executed in the ancestor, forming, by its union with his particular estate, one estate of inheritance in possession; and where it is mediate, as to A. for life, remainder to B. for life, or in tail, remainder to the heirs or the heirs of the body of A., it is then a vested remainder in the ancestor, not to be executed in possession until the determination of the preceding mesne estates: (*Hodgson* v. *Ambrose*, Doug. 337, 345; S. C., 3 Bro. P. C. edit. Toml. 416.) And notwith-

standing an estate be limited to the ancestor expressly for his life (*Goodright* v. *Pullen*, Lord Raym. 1437), or his life estate is declared to be without impeachment of waste (*Jones* v. *Morgan*, 19 Ves. 170), or trustees are interposed to preserve contingent remainders (*Measure* v. *Gee*, 5 B. & Ald. 910), or the estate of freehold is limited to the separate use of the devisee (*a feme covert*), (*Douglas* v. *Congreve*, 1 Beav. 59), or a power of jointuring is given to the first devisee (*King* v. *Melling*, 3 Lev. 58; S. C., 3 Keb. 42), or the testator even proceeds to impose a restriction against alienation (*Hayes ex dem. Foorde* v. *Foorde*), or there is an express direction that the ancestor shall take for life only (*Thong* v. *Bedford*, 1 Bro. C. C. 313), or even if the limitation be to the heir in the singular number, provided no words of superadded limitation be engrafted thereon (*Miller* v. *Seagrove*, Rob. Gav. 96), the rule will nevertheless apply, and in every one of the instances above enumerated vest the inheritance in the first taker.

How far superadded words of limitation will prevent the application of the rule.]—Neither will the circumstance of superadded words of limitation being engrafted, provided the devise be to the heirs in the plural number, prevent the application of the rule; as, for example, a limitation to A. for life, and the heirs male of his body, and the heirs male of the body of such heirs male. Shelley's case is indeed the leading authority in support of the latter construction in the case of a deed, and *Goodright* v. *Pullen* (Lord Raym. 1437) is an instance of the same doctrine as applied to wills, which doctrine has been since supported by many subsequent decisions. But if words of limitation are engrafted on a devise to the heir in the singular number, the engrafted limitation will prevent the application of the rule (*Archer's case*; *White* v. *Collins*, Com. 289), although, as we have just before remarked, the rule would have applied in a case of a limitation to A. for life, with remainder to the heir or heir male of his body, if no words of superadded limitation were engrafted on the latter devise: (*Miller* v. *Seagrove*, *sup.*)

The particular estate being determinable on a contingency will not prevent the application of the rule.]—The circumstance of the particular estate being made determinable on an event which may or may not happen in the lifetime of the first taker, will not prevent the rule from applying (*Merrel* v. *Rumsey*, 1 Keb. 888); as where the particular estate of freehold is limited during widowhood, or the life of another

person (*Curtis* v. *Price*, 12 Ves. 89); nor will it make any difference, although the ancestor himself must die before the object of the gift to the heirs can be ascertained; as where lands are limited to two persons as long as they jointly live, with remainder to the heirs of him that dies first (*Highway* v. *Banner*, 1 Bro. C. C. 584), or the limitation to the heirs is made to depend upon an event, a contingency that may or may not take place; as where a gift is made to A. for life, and if she marries and has heirs of her body, then the heirs to have the lands.

Estate in the ancestor arising by implication will not prevent the application of the rule.]—Neither is it of any importance, provided the ancestor actually does take an estate of freehold, whether he acquires it by express words of limitation (*Hayes ex dem. Foorde* v. *Foorde*, 2 W. Blackst. 658), or a life estate arises in him (*Pybus* v. *Milford*, Ventr. 272; *Wills* v. *Palmer*, 5 Burr. 2615), by implication or resuls to him, as in either case the construction will be the same; for if the intention is once clear that the succession shall go, and be confined to the heirs of the tenant for life, the notion that they shall take by purchase shall be rejected for inconsistency; as all persons claiming in the character of heirs, must take in that quality by descent, and not by purchase.

Requisitions to the application of the rule.]—But in order that the rule may apply, it is essential—

1. That the ancestor should take an estate of freehold.
2. There must be a limitation to the heirs, or the heirs of the body of the ancestor in those terms, or by some equivalent substituted name, and not the heirs, as explained to mean sons or children, or the like.
3. The heirs must take as the heirs of the ancestor to whom the freehold is limited, and not of him and another person.
4. Both limitations must give estates of the same quality.
5. Both limitations must be by the same instrument.

1. *The ancestor must take an estate of freehold.*]—It is essential to the application of the rule that the ancestor should take an estate of freehold, either by express words or by implication; for if he takes no estate whatever, or even a term of years, with remainder to his heirs, or the heirs of his body, the two estates will not unite in the ancestor, who, under these circumstances, will take the life

estate actually limited to him, and no more, and his heirs will take under that designation as purchasers: (*Harris* v. *Barnes*, 1 W. Blackst. 643.) It will be proper, however, to remark here, that, although the heirs will take as purchasers, they will so far take with reference to their ancestor, that the lands so devised will pursue the same course of succession as if they had actually descended from him: (Fearne, Cont. Rem. 80.) An acquisition of this kind is styled an acquisition *per forman doni*, not being strictly a descent, because the estate never attached in the ancestor, or could by possibility attach or be derived through him; and yet not operating as a purchase, because the estate goes in the same course of succession it would have done under a descent, exclusive of persons to whom it would have gone if the heirs had taken absolutely by purchase. Thus, a limitation to the heirs male of the body of B., where no estate is given to B. himself, although it attaches in his heirs male under that special description, and so far operates as words of purchase, yet it not only gives such heir an estate tail male without any words of express limitation to the heirs male of his own body, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs of the body of B., in the same course as if it had descended from B. himself: (*Wills* v. *Palmer*, 5 Burr. 2615.)

2. *There must be a limitation to the heirs, or the heirs of the body of the ancestor, by that or some equivalent substituted name, and not the heirs as explained to mean sons, children, &c.*] —When it appears from the general language of the will that the testator did not really mean to use the word "heirs" according to the ordinary technical acceptation of that term, the court will then construe it in the sense in which he evidently designed it should be taken. Hence, although a testator should devise lands to B. and the heirs of his body, the mere fact of his having used the proper technical expressions for creating an estate tail, will not preclude him from explaining by subsequent words in what sense he intended the words "heirs of the body" to be really construed. If, therefore, after a limitation to "B. and the heirs of his body," the testator were to add, "that is to say, my first, second, third, and every son and sons successively," &c. the subsequent clause would not be treated as contrary to the preceding general limitation to B.'s heirs lawfully begotten, but explanatory of what heirs, &c. were meant; consequently, in a case like this, the rule in Shelley's case would not apply, and B. would take a mere estate for life: (*Short-*

ridge v. *Greber*, 5 B. & C. 866; *Doe d. Woodhall* v. *Woodhall*, 7 L. T. Rep. 322.)

3. *The heirs must take as the heirs of the ancestor to whom the freehold is limited, and not of him and another person.*]—It is also essential to the application of the rule that the heirs should be the heirs of the person taking the estate of freehold, and not of him and any other person. Thus, in *Gossage* v. *Taylor* (Sty. 325), an estate was limited to the wife for life, remainder to the heirs to be begotten upon the body of the wife by the husband, no estate being previously limited to the husband, and it was held that the heirs took as purchasers: (2 W. Blackst. Rep. 728.) But notwithstanding it is necessary, to come within the operation of the rule that the heirs must take as the heirs of the ancestor, and not of him and any other person, this doctrine will not apply unless the parties from whose bodies the heirs are to issue are either married to each other, or may lawfully intermarry; for if they are both of the same sex, or if, by reason of proximity of kindred or affinity they are lawfully disabled from intermarrying with each other, as in such case it would be impossible they could have common heirs of their two bodies, a limitation in these terms would, under the latter circumstances, be construed as to one moiety to give the inheritance to the ancestor, and an estate for life in the other moiety, with a contingent remainder to the heirs of the person who has not any preceding estate of freehold: (*Huntley's case*, Dy. 326; 2 Prest. Estates, 425.) This last proposition, however, supposes that the persons forbidden to marry by reason of consanguinity or affinity have not intermarried with each other; for if they have done so, notwithstanding their marriage is liable to be annulled by suit in the Ecclesiastical Court, yet, until so avoided, all the consequences of a legal marriage attach, and should they either of them die before the sentence declaring the marriage to be void shall be pronounced, the issue of the marriage will be capable of inheriting: (2 Prest. Estates, 433.) As long, therefore, as the marriage subsists, a limitation in the above-mentioned terms would, it is apprehended, have the same operation as if applicable to parties against whose marriage there was no legal impediment.

4. *Both limitations must give estates of the same quality.*]—Another essential to the application of the rule is, that both limitations must give estates of the same quality; or, in other words, the two estates must both be either legal or equitable;

(*Curtis* v. *Price*, 12 Ves. 89.) Mr. Fearne, indeed, in his valuable work upon Contingent Remainders, has carried this doctrine still further; for he expresses his opinion (p. 35) that the rule has not any application in those instances in which the ancestor has the freehold as a trustee, and taking no beneficial interest, notwithstanding the remainder be limited to his heirs, &c. But Mr. Butler, in his note to the above-mentioned work (p. 45, n. *p*), very properly observes that, "as courts of law cannot take notice of any trusts charged on legal estates, the trusts or purposes for which the ancestor's estate of freehold, in the cases proposed by him is charged, cannot be a subject of their consideration. Courts of law, therefore, must treat the case merely as a limitation of the legal freehold to the ancestor, and a limitation of the legal fee to the heirs of his body, and of course hold it to be a legal estate under the rule in Shelley's case." Mr. Preston, also, in his elaborate observations upon the rule in Shelley's case, expresses a similar opinion: (2 Prest. Estates, 311.)

5. *Both limitations must be by the same instrument.*]—It is also essential that the ancestor should take the freehold under the same identical instrument which contains the limitation to his heirs, &c. Hence, if A. be tenant for life under a deed, and the lands of which he is so made tenant for life be granted by another deed, or devised by will to the heirs, or the heirs of his body, the two estates will not unite, and so vest the inheritance in him: (*Doe ex dem. Fonnereau* v. *Fonnereau*, Doug. 487.) But a schedule, or a codicil annexed to or referring to a will, in which an estate is limited to the ancestor, being considered to form a part of the will itself, does not prevent the application of the rule, notwithstanding the limitation to the ancestor should be in one paper, and the limitation to the heirs in another: (*Hayes d. Foorde* v. *Foorde*, 2 W. Blackst. 693.)

As to instruments creating and executing powers.]—Whether the rule will apply when an estate for life is limited to a man by an instrument creating a power, and afterwards during his lifetime an appointment is made in exercise of such power to his heirs, &c., seems for a considerable time to have been a very doubtful point (*Pybus* v. *Mitford*, 1 Ventr. 372); but it has been for some time settled that, as an appointment, when made, is to be viewed in the same light as if contained in the original instrument by which the appointment was created, as soon as the power is executed

the two estates will unite, in precisely the same manner as they would have done if they had been both limited by the same identical instrument: (*Venables* v. *Morris*, 7 T. R. 373.)

Application of the rule as to equitable estates.]—The rule in Shelley's case will apply to equitable, as well as to legal estates; that is, provided that both the estates are equitable estates. But here we must remark, that a distinction has been made in the construction in this respect between trusts executed, and those trusts which are merely executory; for in the latter case courts of equity, in order to effectuate the testator's intention in framing the settlement of which the will is only directory, more according to the spirit and intention than the strict letter of the will, have so far departed from what would be the legal operation of the words limiting the trusts if reduced to a common law conveyance, as sometimes to convert the words "heirs of the body" into words of purchase, and not of limitation. As a necessary consequence, therefore, it sometimes becomes important to determine what kind of trusts should be classified as executed, and what as executory trusts; the true line for distinguishing which appears to be, that when the trusts are wholly and directly declared, as if lands are limited to the use of trustees in trust for B., and after his decease, in trust for the heirs of his body, such trusts being wholly declared will be executed in B., and the courts will not, in that case, depart from the general rules of construction to effectuate the presumable purposes of a settlement contravening the effect of the previous limitations. But where the trusts of the will are only directory, and prescribing the intended limitations of some future settlement, they will be considered as executory.

What trusts are considered as executory.]—Whenever therefore trustees are directed to purchase or convey lands, the directions are not considered as complete, but rather as minutes from which more full and correct limitations are to be framed, in which case the court, in decreeing such settlement, will depart from the strict technical construction of the words in order to carry out the objects the testator really had in view. Hence, a clause exempting the ancestor from impeachment of waste (*Glenorchy* (*Lord*) v. *Bosville*, Cas. temp. Talb. 3), the insertion of trustees to support contingent remainders (*Horne* v. *Barton*, Coop. 257), or any terms or expressions which deny the power to bar the entail, will in all cases of executory trusts of the above kind confine the estate of the first taker to a mere life estate, and the court,

in decreeing a conveyance, will direct it to be framed accordingly, notwithstanding the very same words in the case of a legal estate, or even a trust executed, would have passed an estate of inheritance.

Mere direction for an entail does not necessarily imply a strict settlement.]—Yet, even in the case of executory trusts, there must be some expressions in the will besides the mere limitation to the ancestor for life, to enable the court to discover that the testator meant that his heirs should not take in that right, and under the strict import of that term; for if the testator makes use of technical terms, the courts must necessarily follow their technical meaning, unless the context shows the testator did not intend to use them in their proper sense, and have never gone so far as to say, that merely because the direction was for an entail they would execute that by decreeing a strict settlement.

Mere direction to purchase insufficient to control the ordinary rules of construction.]—It must also be borne in mind, that in order to enable the court to interfere in directing the mode in which the trust is to be performed, it must appear in express terms that the trustees are to settle, convey, &c.; a mere direction to purchase, standing singly, has been holden to be insufficient: (*Blackburn* v. *Stables*, 2 Ves. & B. 367.)

Of the cy pres doctrine.]—And as, on the one hand, courts of equity, in order to effectuate the testator's intention, have restricted a limitation in terms sufficient to pass the inheritance to a mere life estate, so, on the other, they have for the same cause extended a limitation which in express terms would have passed no more than a life estate into an estate of inheritance, in order to embrace more remote objects of the testator's bounty, whom, from the general tenor of the will, it is evident he intended should take, but the language employed by him has been such as, if construed literally, would be contrary to law, in consequence of being limited to take effect upon a contingency that must not necessarily happen within the limits prescribed for the vesting of an executory devise; as where a devise is made to the issue of persons unborn as purchasers. In cases of this kind, therefore, where the intent has been plain and manifest, the courts, rather than the intention should altogether fail, have so construed the devise as to vest the estate in the possible ancestor, and thus, in the nearest practicable way, bring all

the parties intended to be benefited within the scope and operation of the will; and hence it is that this peculiar construction is called the *cy pres* doctrine—a doctrine only allowed in the case of wills (*Brudenell* v. *Elwes*, 7 Ves. 390), and applicable only to real estate (*Routlege* v. *Dorril*, 2 Ves. 357), or money directed to be invested in the purchase of lands, which in equity is transmissible in precisely the same manner as the property itself would have been if actually purchased: (see *Pembroke (Earl of)* v. *Bowden.*) The case of *Humberston* v. *Humberston* (1 P. Wms. 332) has generally been considered to be the leading authority in support of the *cy pres* doctrine. In that case lands were devised to trustees in trust to convey the premises to Mathew Humberston for life, and upon his death to his first son for life, and so to the son of that first son for life, &c., with remainders over to other of the Humberstons for their lives successively, and to their sons when born for their lives, without giving any estate tail to any of them. Lord Chancellor Cowper said, "that although an attempt to make a perpetuity for successive lives be vain, yet, so far as is consistent with the rule of law, it ought to be complied with." He therefore, in order to attain this object, let in all the sons of these several Humberstons then already born to take estates for their lives; but where the limitation was to the sons unborn, then such limitation was to be in tail male. A similar construction has also been adopted in several subsequent decisions: (*Hopkins* v. *Hopkins*, Ca. temp. Talb. 44; *Nicholl* v. *Nicholl*, 1 W. Blackst. 115; *Chapman* v. *Brown*, 3 Burr. 1626; S. C. in Dom. Proc. 3 Bro. P. C. Toml. edit. 269; *Pitt* v. *Jackson*, 3 Burr. 51; *Mogg* v. *Mogg*, 1 Mer. 654; *Smith* v. *Lord Camelford*, 2 Ves. 698.)

Application of the rule in Shelley's case with respect to copyholds.]—The rule in Shelley's case will operate on copyholds in the same manner as upon freehold estates. Hence the same expressions as will vest the inheritance in the ancestor, respect being had to the different nature of the instruments, will have the same effect upon a surrender or a devise of copyholds, a surrender operating in the same manner as a deed of conveyance (*Lovell* v. *Lovell*, 3 Atk. 11; Watk. Cop. 108; Co. Cop. 149), and a will receiving the same construction as a devise of freeholds: (*Widowson* v. *Harrison*, 1 Jac. & Walk. 532.)

As to estates for years.]—As there can be no inheritance of a term of years, the general rule of construction is, that

where property of this kind is limited in terms sufficient to pass the inheritance either in fee or in tail, in the case of lands of freehold tenure, it will pass the absolute interest. Still this rule has some modifications which we shall have occasion to consider when we come to treat upon limitations relating to terms for years, and other chattel interests.

b. What Expressions will be allowed to supply the Regular Words of Limitation.

We have already noticed (*ante*, p. 798), that in the creation of estates tail by will, as well as those in fee simple, the courts, in order to effectuate the intention, have allowed other expressions to supply the place of the regular words of limitation, and thus terms bearing a synonymous meaning with "heirs of the body," when used in the same sense, have been allowed to receive a similar construction; as the term "issue," or "issue male," for example, which when used in a collective sense, as extending to and comprehending the issue from generation to generation, will be construed in the same sense as "heirs of the body," or "heirs male of the body," and create either an estate tail general, or an estate in tail male, accordingly. And even words "sons," "children," &c., although properly speaking they are only descriptive of persons filling either of those characters, and, consequently, words of purchase, may yet, where it is manifest the testator intended to use them as words of limitation, be allowed to have that operation.

General construction of the word issue.]—The word "issue" is a word of limitation whenever it is used in a collective sense, so as to comprehend the issue from generation to generation; but it is of less determinate meaning than the words, "heirs of the body," the latter being the proper technical terms, and as such admitting but of one meaning, whereas the word "issue" is capable of more; for in the statute *de donis* it is used both as synonymous with children and as descriptive of descendants of every degree; and notwithstanding the latter might be its *primâ facie* meaning, yet all the authorities show that it will yield to the intention of the testator to be collected from the will; and therefore it requires a less demonstrative context to show such intention than the technical words "heirs of the body" would do: (*Lees* v. *Mosley*, 1 You. & Coll. 589.)

When the term issue is construed as a word of purchase.] —When the term issue has been construed as a word of purchase, it has been where explanatory terms have been annexed to it that have shown that the testator meant to use the term in the same sense as children. As, for example, suppose a devise was to "A. and his issue," those limitations standing alone would create an estate tail in A.; but if the will afterwards went on to state "the elder of such sons to be preferred to the younger," these subsequent words would explain the term "issue" to mean sons, and no more. So a devise upon trust, to transfer one moiety to the issue of S., to be paid to them at their respective ages of twenty-one, and if only one child, then to such one child for his, her or their benefit, would restrict the word "issue" to mean children: (*Puren* v. *Osborn*, 11 Sim. 143.)

Issue generally speaking is construed to be a word of limitation.]—Generally speaking, however, the word "issue" will be considered as a word of limitation, and, notwithstanding there may be some decisions to the contrary, the weight of authority is decidedly in favour of the construction that even words of superadded limitation engrafted on the limitation to the issue, and even describing a mode of descent inconsistent with an estate to the ancestor (as a devise to A. for life, with remainder to the issue male of his body, and their heirs for ever), has been holden insufficient to convert the issue into purchasers: (*Shaw* v. *Weigh*, Eq. Ca. Abr. 184, pl. 28; *Lees* v. *Mosley*, 1 You. & Coll. 589.)

The words "children," "sons," &c., when to be construed as words of limitation and when as words of purchase.]—Although the words "children," "sons," &c., are in their ordinary signification words of purchase, yet where there is a manifest design that they shall take under the will, which must altogether fail unless they can take through their parent, in that case either of those terms will be treated as words of limitation, and be construed in the same sense as "heirs of the body;" and then, provided the parent takes a preceding estate of freehold, uniting with that estate, it will vest the inheritance in him. Still this construction will only be allowed where the children can take in no other way. Hence, a devise to "A. and his children" will, if A. had any children at the time of the devise, vest a joint estate in both the parent and the children as purchasers; but if A. had no children, he will then take an estate tail, in order to let in the limitations in favour of the children, the latter

of whom would otherwise be utterly debarred from all benefit under the will, for they could not take as immediate devisees, not being in existence, nor by way of remainder, the devise being in express terms immediate to A. and his children: (*Seale* v. *Barters*, 2 Bos. & Pull. 485.)

"*Son*," *or* "*sons*," *when considered a word of limitation.*] —When the words "son," or "sons," is used with a view to the whole class, and not in the common acceptation in which that term is generally employed, it may be treated as a word of limitation, and thus bring a preceding estate of freehold in the parent within the rule of Shelley's case. As, for instance, where lands have been devised to A. generally, and if he shall die without having a son or sons, that the lands shall remain over, in which case the word "son" has been construed as *nomen collectivum*, and synonymous with heirs male of the body, and thus to vest the inheritance in tail in A.: (*Doe d. Burrin* v. *Charlton*, 1 Man. & Gr. 429.) But if, after devising to A. for life, with remainder to his sons generally, or for life, or in tail, there is a devise over in default of issue of A., then the term "issue" will be construed to mean the kind of issue before described, and confine the word "sons" to its strict literal import: (*Doe ex dem. Phipps* v. *Mulgrave*, 5 T. R. 230.) Yet, where a testator, instead of running through the whole line of A.'s sons, has stopped short in some particular point in the enumeration, and then inserted a limitation over in default of issue, A. would, prior to the act 1 Vict. c. 26, have taken an estate for life, with remainder to his first and other sons, either for life or in tail, accordingly as their estates were limited to them, with remainder to A. in tail by implication (*Doe ex dem. Bean* v. *Halley*, 5 T. R. 5); but since that act came into operation he would take a mere life estate, because under that act words importing a failure of issue are construed to mean a failure of issue at the time of the death of the party (s. 29), consequently the limitation over in default of his issue would not enlarge his estate, and such sons or issue will take as purchasers.

c. When an Estate Tail may arise by Implication.

An estate tail may, as we have already remarked, in some cases arise by mere implication, without any words of express devise. One of the instances in which this construction has been allowed, has been where a testator has devised his lands to a third party in case a person who was his

heir should happen to die without issue, or without heirs (*Goodridge* v. *Goodridge*, Willes, 369); in either of which cases the heir was held to take an estate tail by implication, and the limitation over was considered good as a contingent remainder. But this rule had no application where the limitation over was in case a stranger should die without issue, or heirs, unless such stranger took some preceding estate under the will (*Gardiner* v. *Sheldon*, Vaugh. 259; S. C. 1 Eq. Ca. Abr. 179 pl. 6); and the limitation over in the latter case, as to wills made prior to the Wills Act, 1 Vict. c. 26, must have altogether failed, in consequence of being an executory devise limited to take effect after an indefinite failure of issue.

Alterations effected by Wills Act, 1 *Vict. c.* 26.]—But as to wills made subsequently to 1838, as the 29th sect. 1 Vict. c. 26, confines the dying without issue to the death of the party, it seems the heir would not now, by reason of the lands being devised to a third party, in case he should happen to die without issue, take an estate tail, but an estate in fee simple, subject to a limitation over by way of executory devise; the failure of issue, by the express terms of the above statute, being restricted to the lifetime of the party. This enactment therefore seems to establish a distinction, which did not previously exist, between the construction of a limitation over, in case the testator's heir should die without issue, and where it was to depend upon his dying without heirs. Previously, as we have just observed, the construction in both instances would have been precisely the same, and in either case the heir would have taken an estate tail; whereas, in the first instance, he will now take an estate in fee, subject to a limitation over by way of executory devise; in the other an estate tail, with a remainder over expectant on the determination of that estate.

The reason of this diversity is, that the act of Victoria confines itself to the terms "dying without issue," and is altogether silent as to "dying without heirs," so that the former terms derive their construction from the statute, whilst the latter retain the same construction they before possessed.

d. As to Cross Remainders in Tail.

Cross remainders between tenants in tail may also with propriety be ranked under the head of estates tail arising

by implication. This happens where lands are given in undivided shares to two or more persons for particular estates, as a devise to A., B., and C. as tenants in common in tail, and for default of such issue to the testator's own right heirs, in which case the testator's intention would be construed to be that the property should be enjoyed by A., B., and C., and their issue, as long as there shall be any such, and that on the death of either of the tenants in tail without issue, his or her share shall go over to the survivors: so that nothing shall go over to the testator's heirs until after the determination of all the estates tail. In such case, A., B., and C. take their original shares as tenants in common, and the remainders limited to them on the determination of the particular estates are known by the name of cross-remainders: (see the form of limitation to tenants in common in tail, 3 Con. Prec., Part VII., No. XLVI., clause 5, p. 4, 2nd edit.; *id. ib.* No. XLVII., clauses 8 and 9, p. 8.)

Whether there is a stronger presumption in favour of cross-remainders between two than between more persons.]—It has been said, that as between two, there is a stronger presumption in favour of cross-remainders than between more persons; but no such distinction really exists, for cross-remainders will not be raised between two, unless an intention to that effect can be collected; and when that can be done, the construction will apply equally to a greater number: (*Phiphard* v. *Mansfield*, Cowp. 797.) And notwithstanding it seems formerly to have been considered that the word respectively, or any word of similar import, was sufficient to repel the implication of cross remainders (*Perry* v. *White*, Cowp. 777); this doctrine has been since exploded, and it is now settled that the word "respectively," or "several and respective," or other words bearing the same meaning, are insufficient to prevent the implication of cross-remainders: (*Green* v. *Stephens*, 12 Ves. 419; 17 *ib.* 64.)

Cross-remainders will not be implied except with respect to the same property.]—In all the instances in which cross-remainders have been raised by implication, the parties, although they took distinct shares, yet they all took them in the same property; for if a testator were to devise separate estates, as Blackacre to A., Whiteacre to B., and Greenacre to C., and afterwards to limit them over on all the devisees dying without issue, as the subject-matters of the devise would in that case be distinct and several, no cross-remainders would be implied between them: (*Cole* v. *Levingston*, 1 Ventr. 224.)

Practical suggestions for penning cross-remainders.]—To prevent the possibility of any questions from being raised upon the subject, the proper course will be to limit the lands to the use of all the tenants in common in tail, in equal shares, as tenants in common, and the respective heirs of the body of all and every of them; and then add, that in case there shall be a failure of issue of one or more of such tenants in common, the shares, both original and accruing, of the party of whom there shall be such failure of issue, shall go over to the survivors or survivor of them: (see the form 3 Con. Prec., Part VII., No. XLVI., clause 5, pp. 4 and 5, 2nd edit.)

2. *Quasi Entails.*

Although, strictly speaking, estates for years are incapable of being entailed, because estates tail can only be created out of estates of inheritance, still, where lands are held for a term of years only, they may be so settled as to answer nearly the same purposes as if actually entailed, and thus be rendered unalienable for nearly as long a time as if proper estates tail had been really created.

How strict settlements of leasehold estates are to be effected.]—This may be done either by a deed or by will, and when effected by the latter instrument, the property may be tied up and rendered unalienable for any period that does not exceed the duration of lives in being at the time of the testator's death, and twenty-one years afterwards (*Thelluson* v. *Woodford*, 4 Ves. 432), and, for the above purpose, a child *in ventre sa mere* at the time of the testator's decease is viewed in the same light as if actually born at that period: (*id ib.*) But should the contingencies exceed the above-mentioned limits, the estates upon which they are dependent will altogether fail, and the first taker will thereby acquire an absolute interest in the whole property (*Ware* v. *Polhill*, 11 Ves. 257), and, generally speaking, as we have already remarked, if the property be limited on such terms that it was of freehold estate, it would create an estate tail, it will confer the absolute interest in the case of a term of years or any other chattel interest, and all the subsequent limitations will be void (*Button* v. *Twining*, 1 Mer. 176); so that, in point of fact, in the case of a term of years and personal chattels, the vesting of an interest which in freehold property would be an an estate tail, bars the issue in tail and all subsequent limitations as effectually as a fine and

recovery would formerly have done, and a disentailing deed would now do, in the case of estates entailable within the statute *de donis*; and although a distinction seems to have been formerly made between a term in gross, and a term that is created *de novo* out of the inheritance, and to have been considered that limitation of a term *de novo* to a man and the heirs of his body would have endured no longer than he has heirs of his body, although in the case of a term of years already in existence it would have passed the absolute interest (*Leonard Lovie's case*, 10 Rep. 87), this distinction has been long since exploded, it being settled that in either case the absolute interest will pass: (*Duke of Norfolk's case*, 1 Cha. Cas. 1.)

Construction of the words "dying without issue," &c. in a bequest of chattels.]—Yet notwithstanding that, generally speaking, the same words which would create an estate tail in freeholds will pass the absolute interest in chattels, either real or personal, a rule which applies equally whether the terms made use of would have created an express estate tail, or have caused that estate to arise by implication (*Wilkinson* v. *South*, 7 T. R. 555); still, in the construction of a will disposing of chattel property, the courts, in order to aid the manifest intent, have allowed words to control the usual and technical import of the words "dying without issue," or other similar expressions, and thus to construe those terms not as importing an indefinite failure of issue, but to mean the party dying without leaving any issue at the time of his decease; thus bringing the contingency of dying without issue within the limits allowed for the vesting of an executory devise, which, as we have just before remarked, may be good if brought within the limits not exceeding twenty-one years after a life or lives in being. Hence, if the limitation over is of a mere life estate to some party already in existence (*Trafford* v. *Boehm*, 3 Atk. 449), or the survivor of one, two, or more persons (*Sayer* v. *Hughes*, 1 P. Wms. 534), or the dying without issue is limited to the death of the first taker under twenty-one (*Thrustout dem. Small* v. *Denny*. Wils. 270); or to the death of the testator himself (*Wellington* v. *Wellington*, 1 Blackst. 645), these contingencies must every one of them necessarily take place during the lives of persons in existence either in the testator's lifetime, or at the time of the testator's death, and thus fall clearly within the prescribed limits of an executory devise.

As to chattels directed to go as heirlooms.] —Chattels

directed to go as heirlooms are equally within the rule which prohibits chattels from being transmissible by descent, as any other kind of personal property; and therefore, as in the case of estates for years, notwithstanding they may be directed to be kept with the family estate as long as the rules of law and equity will permit, still property of this nature must vest absolutely in the first taker, who has such an interest limited to him as would have given him the inheritance in case the devise had been of freehold estate, and will therefore become part of his personalty, and as such, be transmissible to his personal representatives: (*Sheffield* v. *Omery*, 3 Atk. 278.) In bequests of heirlooms a distinction seems at one time to have been attempted to be set up between a bequest of the use of a personal thing and of the thing itself, but this distinction has been long since exploded: (*Lampet's case*, 10 Rep. 47.) Neither will it make any difference whether the devisee is a person *in esse* and ascertained or otherwise: (*Hyde* v. *Parrott*, 1 P. Wms. 1.)

Whether security can be required from a party taking a limited interest in heirlooms.]—It was formerly the practice, where chattels were limited to go as heirlooms, for courts of equity to compel the persons taking limited interests, upon taking possession of the heirlooms, to give security for their preservation during their lifetime, as also for their being duly forthcoming at the time of their death (*Bracken* v. *Bentley*, I Eq. Ca. Abr. 78, pl. 1); but the practice for many years past has been to sign an inventory to be deposited for the benefit of all parties, which Lord Thurlow observes was more equal justice, as there ought to be danger to call for security.

Heirlooms not liable to claims of creditors beyond the interest the legatee himself takes in them.]—Heirlooms in which a legatee takes only a life estate, or any other limited interest, are not liable to the demands of creditors beyond the legatee's interest therein; neither can the party taking such limited interest, by any act of his, prejudice the interests of those who are to succeed him upon his decease, whose rights will supersede even those of a purchaser for valuable consideration, and this, notwithstanding the latter has no notice whatever of the settlement. Hence, where plate was bequeathed to trustees during the life of the testator's wife, requiring her to sign an inventory, which she did at the time of the delivery, and she afterwards pawned it to a

pawnbroker for valuable consideration, who had no notice of the settlement, and after her death an action of trover was brought by those claiming under the remainder-man, and upon the question whether the defendant was bound to deliver up the plate without being paid the money he had advanced on it, the court said the point was clearly established, and that the law must remain as it was until the legislature thought fit to provide that the possession of such chattels should be deemed sufficient proof of the ownership: (*Earl of Macclesfield* v. *Davis*, 3 Ves. & Bea. 16.) It seems that where goods and household furniture are limited to go as heirlooms to be enjoyed by the owner of the house to which they belong, they cannot be let separately or otherwise than with the house; but it appears they may be let with the house itself: (*Fearne ex dev.* 487.)

IV. Practical Directions for Penning Limitations in Strict Settlement.

As a tenant for life, with the concurrence of the tenant in tail, might, by suffering a common recovery, have not only barred the estate tail, but also all estates in remainder and reversion expectant thereon, and thereby have acquired an absolute and indefeasible estate of inheritance in fee simple, it became the practice, where the object of the will was to keep the property for a long time in the same channel, to postpone the vesting of the estates tail, by giving life estates only to such objects as should be in existence at the time of the testator's decease, with remainder to their first and other sons in tail. Another plan has been to devise the lands to trustees during the life of, and in trust for, the first takers, with a legal remainder to the heirs, or heirs male of their bodies, in which latter case the limitation to the *cestui que trust* being a mere equitable life estate, and the limitation to the heirs of his body a legal remainder, the two limitations could not have united so as to vest the inheritance in the first taker under the rule in *Shelley's case*, so that during the whole lifetime of the *cestui que trust* the limitation to his heirs is contingent, and consequently the entail could not have been effectually barred without the concurrence of the trustees, which it seems they would not be authorized to give without the direction of the Court of Chancery: (*Tipper's case*, 1 P. Wms. 359; *Else* v. *Osborn*, *ib.* 387; *Bassett* v. *Clapham*, *ib.* 358.) Another plan has been to limit the lands to the use of trustees, in trust for the first taker for life, with equitable life estates to his first and other sons successively

born in the testator's lifetime, with legal remainders to their first and other sons successively in tail; with legal remainders in tail to first and other sons of the first taker not born in the testator's lifetime: (see the form 3 Con. Prec., Part VII., No. XLVIII., clauses 9 to 15 inclusive, pp. 15, 17, 2nd edit.) It is necessary to make this distinction between the limitations to those sons who are born in the testator's lifetime and those born subsequently, because a limitation to the children, sons, daughters, or other issue of an unborn person is void for remoteness, since such objects may not come *in esse* until more than twenty-one years after a life or lives in being: (*Robinson* v. *Robinson*, 2 T. R. 380; S. C. 2 Bro. C. C. 22.) Neither will the *cy pres* doctrine be permitted where an attempt is made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of limitations: (*Somerville* v. *Lethbridge*, 6 T. R. 213; *Seaward* v. *Willock*, 5 East, 198; *Beard* v. *Westcott*, 5 B. & Ald. 801.)

Origin of the introduction into settlements of trustees to preserve contingent remainders.]—In order also to prevent the contingent remainders from being destroyed, as they might otherwise have been for want of an estate of freehold to support them, by the determination of the preceding life estate before the objects to whom such remainders were limited came into existence, a practice was introduced of interposing trustees for the purpose of preserving contingent remainders, which was effected by limiting the use of the legal estate from and after the determination of the estate of tenant of the preceding estate of freehold by forfeiture or otherwise, to some trustee or trustees during his life, upon trust to preserve the contingent uses and estates expectant on his decease from the destruction to which they would otherwise have been liable from his surrender, forfeiture, or tortious alienation; but through the means of the interposed estate of the trustees, in case of the determination of his life estate otherwise than with his death, the estate of the trustees for the residue of his natural life then took effect, and became an estate of freehold in possession sufficient to support the remainders depending in contingency: (see forms of this kind 2 Con. Prec., Part VII., No. XXXVI., clause 2, p. 833, 2nd edit.; *id. ib.* No. XLII., clauses 3 and 5, pp. 883 to 889; *id. ib.* No. XLIII. clauses 8, 11, 18, and 23, pp. 895, 896, 897; *id. ib.*, No. XLIV., clause 5, p. 907; *ib.* Vol. III., No. XLV., clause 1, p. 2.) But it is no longer actually necessary to

insert limitations to trustees, in order to preserve the contingent remainders, because the statute 8 & 9 Vict, c. 116, has enacted that contingent remainders existing after the year 1844 are not to fail by the destruction of the prior particular estate (sect. 8); still, so little reliance appears to have been placed by the profession upon the operation of this statute, which altogether seems to be rather obscurely worded, that the clause still retains its usual place in settlements of real estate, whether made by deed or by will.

How limitations should be penned where there are several limitations and brevity is desirable.]—If several life estates precede the contingent remainders, the limitations to preserve the whole of these remainders may, whenever brevity is desirable, be all contained in one and the same clause, by simply limiting the lands upon the determination of each estate for life to the use of the trustees to preserve contingent remainders: (see the form 3 Con. Prec., Part VII., No. XLV., clause 1, p. 2, 2nd edit.; *id. ib.* No. XLVIII., clauses 11 and 13, pp. 15, 16.)

How penned, so as to preserve the legal estate in the remainders.]—In penning the limitation to the trustees, the proper way, where the legal estate is intended to pass, is to limit the lands "To THE USE of the said (*trustees' names*) and their heirs *during the life* of the said (*tenant for life*), UPON TRUST to preserve the contingent remainders hereinafter limited;" to which may be added, "but nevertheless to permit and suffer the tenant for life to take the rents and profits thereof." It is essential that the limitation should give the trustees an estate *during the life* of the preceding tenant for life; because if those words were omitted, the trustees would take the legal fee, and all the subsequent estates would become merely equitable interests (*Elmore* v. *Tindall*, 2 You. & Jerv. 605), but it is not necessary to annex to the clause permitting the tenant for life to receive the rents and profits, which may therefore be always safely omitted where brevity is desirable.

How penned where there are several previous life estates.]—If there are several preceding life estates, as where a testator is desirous of giving life estates to his first and other sons in tail, and brevity is desirable, the best plan is to make the limitation to the testator's first and other sons successively for life; and after the determination of the estate of each son respectively in his lifetime, TO THE USE of (trustees to

preserve, &c.), and their heirs during the life of the same son, UPON TRUST to preserve contingent remainders, &c.: (see the form 2 Con. Prec., Part VII., No. XLIV., clause 5, p. 908, 2nd edit.)

Where the tenant for life is to take a mere equitable estate.]—If the tenant for life is to take a mere equitable estate, the limitation should be to the trustees and their heirs during the life of, and in trust for, the equitable tenant for life, *upon trust* to pay him the rents and profits during his life; and if there are several preceding life estates, then the limitation should be to the trustees during the lives of each of the equitable tenants for life respectively, *upon trust* to preserve the contingent remainders; and upon further trust to pay the same tenant for life the rents and profits of the premises during his life: (see the form 3 Con. Prec., Part VII., No. XLV., clause 1, p. 2, 2nd edit; *id. ib.* No. XLVIII., clauses 11 and 13, pp. 15 and 16.)

Where the first taker is to have a mere chattel interest.]—If the first taker is to have a mere chattel interest, the proper way is to limit the property to the use of trustees for the term of ninety-nine years, to commence from the time of the testator's decease, if the party shall so long live, *upon trust* to pay him the rents and profits during his life; and, subject thereto, TO THE USE of (*trustees to preserve, &c.*) *upon trust* to preserve the contingent remainders thereinafter limited.

As to entails upon daughters.]—Lands may be entailed upon daughters in precisely the same manner as upon sons. In the case of daughters, however, it is a very common practice to constitute them tenants in common, with cross remainders between them, which is not often done in entailing property upon sons. It is also a very common practice to limit the estates of daughters upon trust for their separate use: (see forms of limitations in favour of daughters, 2 Con. Prec., Part VII., No. XLIII., clauses 14, 16, 17, 21, 22, 26, pp. 896 to 898, 2nd edit.; *id. ib.*, No. XLIV., clause 6, p. 908; *id.* Vol. III., No. XLVI., clauses 1 and 5, pp. 3 and 4; *id. ib.*, No. XLVIII., clauses 13 and 15, p. 16; *id. ib.*, No. XLIX., clause 9, p. 23.)

Where the trust is to be for the separate use of a married woman.]—Where the first taker is a married woman, and

the property is to be settled to her separate use, the trust should be to pay the rents and profits to her during her life, for her sole and separate use, free from the control of any husband with whom she has already, or may thereafter, intermarry, and if she is to be restrained from anticipating the growing proceeds, it should be so declared: (see the form 3 Con. Prec., Part VII., No. XLVI., clause 2, p. 4, 2nd edit.)

As to the appointment of protectors to settlements.]—Another mode of restraining the barring of entails was by the introduction of a new character in settlements of real property, styled a protector, a creature of the Fines and Recovery Substitution Act (3 & 4 Will. 4, c. 74), but whose office assimilates very much to that of the tenant to the *præcipe* under the pre-existing law, and operates in like manner as a kind of check upon the too free alienation of settled property.

Difference in qualifications of tenant to the præcipe and protector.]—There is in some respects, however, a difference in the qualifications of a tenant to the *præcipe*, and a protector. The former must have been seised of an immediate estate of freehold (whether by right or wrong was immaterial), upon which the estate tail was expectant, his very existence being dependent upon his estate in the lands: (Lit. s. 519; 1 Shep. Touch. 42; Plow. 515; *Athan* v. *Lord Anglesea*, 1 Eq. Ca. Abr. 16.) Whereas a protector may not only acquire that character by taking a mere chattel interest, as a term of ninety-nine years, determinable on lives, equally as well as if he had taken an estate of freehold; but even without taking any estate or interest whatever in the settled property. In fact, there are two distinct and separate modes by which protectors may be created; one by the estate they actually take in the settled property, without any express appointment to the office; the other by an express appointment to the office, but without having any estate or interest whatever in the property conferred upon them.

What estate will be required to constitute a protector.]—With respect to the estate in the settled property which will constitute a protector, the Fines and Recovery Substitution Act (3 & 4 Will. 4, c. 74), enacts, that where there is under a settlement an estate for years, determinable on a life or lives, or any greater estate, prior to an estate tail, the owner of such prior estate is to be the protector: (sect. 22.)

But though a term of years determinable upon a life or lives will make a protector, an absolute term of years, however long in point of duration, will not constitute him such: (stat. 3 & 4 Will. 4, c. 74, s. 22.) Neither will such an estate as a party takes as tenant in dower (sect. 27), heir, executor, administrator, or assign, constitute him or her a protector. Nor will a lessee at a rent created or confirmed by a settlement (sect. 26), nor a bare trustee (sect. 27), (unless where, under a settlement made prior to the passing of the acts, he would have been made tenant to the *præcipe*), as such become a protector. But where there shall be more than one estate prior to the estate tail, the owner of which, but for the last two preceding clauses, would have been the protector of the settlement, shall, by virtue of such clauses, or either of them, be excluded; then the person (if any) who, if such estate did not exist, would have been the protector, will be such. Where the estate of a married woman, sufficient to constitute a protector, is not settled, or agreed to be settled, to her separate use, she and her husband together will be the protector; and in the latter case, she may consent to an alienation without her husband's concurrence, in the same way as if she were sole (sect. 24); whereas, if she is tenant in tail she cannot convey without his consent, and even with his consent and concurrence the deed of conveyance must be duly acknowledged by her in pursuance of the terms prescribed by the act. But if the husband is of unsound mind, or otherwise incapable of executing the deed, the Court of Common Pleas may dispense with the husband's concurrence: (sect. 91; *Re Fanny Maria Browne*, C. P. 14 January, 1846; 6 L. T. Rep. 297.) And where a protector becomes insane, or a felon convict, the Lord Chancellor or the Court of Chancery will be the protector.

Appointment of protector taking no estate in the premises.] —With respect to protectors who derive their office from a mere appointment of the settlor without taking any estate or interest whatever in the property, the 32nd section of the above-mentioned act empowers any settlor entailing lands to appoint any number of persons, not exceeding three, and not being aliens, to be protectors of the settlement, and he is also empowered, by a power of appointment in the deed or will making such settlement, to perpetuate the protectorship to any persons, not exceeding three, and not being aliens, whom he may think proper: (sect. 33; see the form 2 Con. Prec., Part VII., No. XLIII., clauses

28 and 29, pp. 889, 890, 2nd edit.) The effect of expressly appointing one or more qualified persons to the office of protector will be to exclude those persons who, but for such express appointment, would have filled the character of protector as incidental to the estate limited to them by the settlement. As, for example, suppose lands are settled to the use of A. for life, with remainder to his first and other sons in tail, here A., by virtue of his subsisting life estate, prior to the estate tail limited to his first and other sons, is the protector of the settlement, provided no special protector be appointed in express terms. But if one or more persons are expressly appointed as the special protector or protectors of the settlement, then the tenant for life, who but for the latter appointment would, in consequence of taking the preceding estate in the premises, have filled that character, will be excluded, and all his powers and privileges will pass over and become vested in the special protector or protectors. If, therefore, a testator wishes to control the power of alienation within the narrowest possible limits, he may not only appoint special protectors, but also authorize the perpetuation of the office as vacancies may occur by the death or retirement of such protectors, and during the whole time the protectorship subsists, the tenants in tail cannot bar the entail effectually, without the consent of the special protectors, even with the actual consent and concurrence of the tenant of the preceding particular estate, and who as such, in the absence of the appointment of a special protector or protectors, would have been the actual protector of the settlement by virtue of the estate he takes under it. But the tenants in tail, without such consent, may bar their own estates tail, and thereby create a base fee determinable on failure of issue of the estate tail so barred, and such base, if conveyed to a purchaser for valuable consideration, may be afterwards confirmed by a subsequent disposition by the tenant in tail in case there ceases to be a protector, or even during the protectorship, provided the subsisting protector or protectors for the time being can be induced to consent thereto. The appointment of protectors therefore does not altogether prevent an alienation of the property by the tenants in tail, although it creates such a defect in the title as must necessarily cause it to fetch a far lower price in the market than it would have done if they could have conveyed an absolute and indefeasible estate of inheritance in fee simple to the purchasers. This disadvantage would, in all probability, deter a tenant in tail of a protected settlement,

who was a prudent man and not hard pressed for money, from attempting to alienate the settled property without the protector's consent; but it would prove a very inadequate check either to an extravagant, or a necessitous one; so that it seems doubtful whether the appointment of special protectors would in many instances attain the object contemplated by the settlor of keeping the limitations undisturbed; for, although it might often prove the means of the property being alienated upon terms very disadvantageous to the vendors, it still would not prevent such alienation from being made. Whenever, therefore, a testator gives instructions for preparing a strict entail of this kind, it will be proper for his professional adviser to draw his attention to the subject, and point out to him the disadvantages as well as the advantages likely to result from striving to impose too long continued a control over the free alienation of the settled property.

Protectors have an absolute power either to give or to withhold their consent.]—Another point also must not be lost sight of in the appointment of special protectors, which is, that although they do not directly take any estate or interest in the settled property, they have nevertheless an absolute power of either giving or withholding their consent to barring the entail; nor is there any law to prevent them from making what market they can of their consent, either by selling it for a pecuniary consideration, or by refusing to give it unless a sum of money be paid them for so doing; and every shift or contrivance by which it shall be attempted to control the power of a protector to give or withhold his consent, and any agreement to prevent him from exercising his absolute discretion, or entered into by him to withhold his consent, will be void: (sect. 36.) Neither will a court of equity interfere to restrain him in the exercise of it: (*ib.*)

As to protector's powers in respect of prior ownership in the lands.]—And a protector of a settlement, in respect of the ownership of a prior estate, has in like manner an absolute power of giving or withholding his consent altogether independent of the estate he takes in the lands, so that whether he conveys away his interest, or retains it, his consenting power remains unaltered; hence, if such protector conveys away his life estate, he may still consent to a disentailing assurance by the tenant in tail whose estate is expectant thereon, and may make what bargain he pleases for giving such consent, by which means, in point of fact,

he may sell his estate in the same premises twice over. And, as on the one hand the protectorship does not cease by the protector's conveying away the property which constituted him such, so on the other he may consent to the disposition by the tenant in tail, and still retain his own estate; or he may, if he thinks proper, convey as well as consent, and if he does the latter, whatever estate he takes in the property may be included in the conveyance; but if he merely consents, the effect of such consent will be to bar the ulterior limitations to take effect after or in defeasance of the estate tail, but his own estate in the property will remain undisturbed: (1 Hughes Pract. Sales, 176, 2nd edit.)

How the devised premises should be described.]—In penning a will creating a strict settlement, the lands themselves must be so described as to leave no doubt as to their identity. They may be either devised to trustees in fee, and the uses limited to arise out of their seisin, or, as is the more general practice, to lands should be simply devised to the uses thereinafter declared (see the form 3 Con. Prec., Part VII., No. XLII., clause 1, p. 880, 2nd edit.)

Where there is a term for raising portions for younger children.]—If, as most frequently happens in wills creating settlements of real estate, there is to be a trust for raising portions for younger children, it will be proper to create a long term, as 1000 years for instance, for that purpose, and in this case two distinct sets of trustees will be necessary, as the trustees of the term ought to be distinct persons from the trustees to preserve contingent remainders. In penning a will of this kind, the proper way is to devise the lands to the uses thereinafter declared, the first of which must be a limitation *to the use* of the (*trustees of the term*), for the 1000 years term, upon the trusts thereinafter declared, and subject thereto to the use of the several tenants for life, with remainder to trustees to preserve, &c., with remainder to their first and other sons, &c., in tail, with remainders over, &c. If special protectors are to be appointed, this appointment should be made immediately after the limitation of all the estates tail; and then the rusts of the 1000 years term for raising the portions should be declared: (see the form 2 Con. Prec., Part VII., No. XLIII., clauses 1 to 31 inclusive, pp. 893 to 911, 2nd edit.; *id. ib.*, No. XLIV., clauses 1 to 9, pp. 906 to 911.) If any special powers are to be inserted, such as authorizing tenants for life to make jointures upon wives, or for females

to appoint life estates or other interests in favour of their husbands, to raise portions for children, to grant leases, cut down timber, to sell, exchange, or make partition, they should be next inserted. Shifting clauses also, if any such are to be used, should be inserted amongst these latter clauses: (see the form of shifting clauses, 3 Con. Prec., Part VII., No. XLIV., clause 32, p. 39, 2nd edit.) It will then be proper to add the usual declaration with respect to estates vested in the testator in trust, or by way of mortgage, as also a proviso for the cessor of any terms created by the settlement, although the latter is rather a formal than an essential clause; as all terms are now made to cease as soon as the purposes for which they were created are satisfied: (8 & 9 Vict. c. 112). After this should follow the usual power to change trustees, the appointment of the executors, and the common clause revoking all prior wills, &c.: (see the form 2 Con. Prec., Part VII., No. I., clauses 11, 12 and 13, pp. 637, 639, 2nd edit.)

Where an annuity is charged on the settled premises.]—Where an annuity is charged on the settled premises, either by way of jointure upon the testator's wife, or for any other purpose, this limitation is generally the first use declared, being inserted even prior to the limitation of the term for raising portions, &c., where the will contains a trust of that nature. To the limitation of the annuity is commonly added the usual powers of distress and entry: (see the form 2 Con Prec., Part VI., No. XLIII., clauses 2, 3, and 4, pp. 893, 894, 2nd edit.; *id. ib.*, No. XLIV., clause 2, p. 906.) It is not a common practice to limit a term to secure an annuity given by will by way of jointure, although this is frequently done in the case of marriage settlements.

Where the settled property is devised upon trusts for accumulation.]—If the settled property is bequeathed upon trusts for accumulation, the lands should be devised to the use of the trustees during the term of accumulation, which, however, must not exceed the term of twenty-one years from the testator's decease; and subject thereto, the uses must be declared for the benefit of the several objects of the settlement: (see the form 3 Con. Prec., Part VII., No. XLVIII., pp. 10 to 18, 2nd edit.; *ib. id.*. No. XLIX., p. 19.) Trusts for accumulation will be more fully treated upon in a subsequent part of the present work.

Where the settled property consists of copyhold estates.]—

Where the settled property consists of copyhold estates they are generally devised to trustees, thus vesting the legal estate in them, and the objects of the trusts take equitable estates only in the premises. In settlements of this kind the trustees are generally authorized and directed out of the rents and profits to levy and pay all such expenses as may be incurred as incidental to the copyhold premises, or as they shall incur in the execution of the trusts reposed in them.

Where leasehold estates are the subject-matter of the settlement.]—When leasehold estates holden for a term of years, whether absolute or determinable upon lives, form any part of the subject-matter of the settlement, the legal estate is generally vested in trustees, who are directed out of the rents and profits to pay reserved rents, and all other necessary outgoings, to which, in the case of leases determinable on lives, is added a trust or power of renewal. As property of this kind is incapable of being entailed in the strict sense of that term, because, as we have already had occasion to remark, if a term of years is limited in such terms as would create an estate tail in freeholds, it will pass the absolute interest in the term, the plan, in cases where freehold and leasehold estates are intended to be held by the same objects of the settlement, has been to declare that the trustees of the leasehold shall stand possessed of such premises upon such trusts, as allowing for the different qualities of the property, will nearest correspond with the trusts thereinbefore declared concerning the freehold portion of the premises, to the intent that such leasehold premises, so far as the rules of law and equity will permit, may be held in trust for and beneficially enjoyed by the person or persons who for the time being shall be in the receipt of the rents or profits of the said freehold hereditaments and premises under the limitations thereinbefore contained; concluding with a proviso that the said leasehold premises shall not, for the purpose of transmission, vest absolutely in any person or persons thereby made tenant or tenants in tail, unless such person or persons shall live to attain the age of twenty-one years: (see the form 3 Con. Prec., Part VII., No. LI., clauses 26, 27, 28, pp. 36, 37, 2nd edit.)

As to chattels directed to go as heirlooms.]—With respect to chattels directed to go as heirlooms, the usual course has been to bequeath them to the trustees, *in trust* to permit the same to go and be enjoyed with the mansion-house to

which they appertain, so long as the rules of law and equity will permit, by the person or persons who, for the time being, should be entitled to the possession of the mansion-house; but so that the same shall not vest absolutely for the purpose of transmission in any person thereby made tenant in tail, unless he or she shall attain the age of twenty-one years: (see the form 3 Con. Prec., Part VII., No. LII., clause 8, p. 44, 2nd edit.) If the heirlooms consist of jewels, or other articles of that nature, it is usual to add to the above clause, that the persons entitled to have the use and enjoyment of them may enjoy that privilege during their minority: (*id. ib.* clause 13, p. 47.) It is also a common practice to direct that the trustees shall cause a distinct inventory to be made of the whole of the articles, one copy of which is to be kept by the trustees, and the other by the party who for the time being is entitled to the use and enjoyment of the heirlooms. To this may be added a clause directing that the trustees shall examine into the state of the heirlooms, and cause reparations, &c.; with a further direction, that if the mansion-house is sold, the heirlooms are still to be preserved: (*id. ib.* clauses 14, 15, 16, p. 48.)

V. Vested and Contingent Legacies.

Distinction between vested and contingent legacies.]—The distinction between a vested and a contingent legacy will be found to consist in whether the gift is limited to take effect at a future time, or upon the happening of some contingent event; as, for instance, a bequest of 100*l.* a-piece to the two children of A. B. (*Snell* v. *Dee*, 4 Salk. 414); or the ordinary limitation, "to all and every the children of B., who, being a son or sons, shall attain the age of twenty-one years, or who, being a daughter or daughters, shall attain that age or marry;" or whether the bequest itself is immediate, and the time of payment is to be delayed until some future time, or to the happening of some contingent event; as a bequest to all and every the children of A. B., the shares of such of them as shall be sons to be paid to them on their severally attaining their respective ages of twenty-one years, and of such of them as shall be daughters, on their severally attaining that age or days of marriage. In the former case the legacy will be contingent; because, in the first instance, the time, and in the second, the events upon which it is to take place, are annexed to, and form part of the very substance of the gift (*Knight* v. *Knight*, 2 Sim. & Stu. 490; *Young* v. *Macintosh*, 13 Sim. 445); but in the

latter case it will be vested, for there the bequest itself is immediate, although the time of its payment is deferred, which is so disannexed from the gift as to form no part of its essence, being in fact *debitum in præsenti solvendum in futuro:* (*Faulkner* v. *Hollingworth*, stated 8 Ves. 558; 2 Wms. Exors. 881, 2nd edit.; 1 Rop. Leg. 557, 4th edit.)

Exceptions to the rule as to legacies being contingent when bequeathed to legatees at a future period.]—But the rule with respect to a legacy being construed to be contingent when bequeathed to one at a future time is not without its exceptions; as, first, where a person bequeaths a legacy to a person on his attaining a certain age, and either gives him the immediate interest, or directs it to be applied for his benefit, in which case the legacy will not be contingent; for the disposition of the interest will be considered a sufficient indication of the testator's intent that the legatee, at all events, should have the principal; and on these grounds the legacy will be treated as vested: (*Hanson* v. *Graham*, 6 Ves. 236; 1 Rop. Leg. 498; 2 Wms. Exors. 889.) Still, in order that provision for maintenance may aid the construction of a vested interest, it must be co-extensive with the full amount of interest on the legacy (*Vaudry* v. *Geddes*, 1 Russ. & Myl. 203); and payable out of no other fund, otherwise such provisions will afford no ground for presuming the testator intended such legacies to vest before they became due. To raise such a presumption, also, the bequest of the interest must be certain; for if the interest be as uncertain as the principal, it will not convert the latter into a vested interest; consequently a legacy to A. when he attains twenty-one, with interest, will be a contingent and not a vested legacy: (*Knight* v. *Knight*, 2 Sim. 490; 1 Rop. Leg. 573, 4th edit.)

Second exception.]—The second exception to the rule is, when the absolute property in the fund is bequeathed in fractional interests in succession at periods which *must* certainly arrive; as to or in trust for A. for life, and after his death to B.: (*Davis* v. *Fisher*, 5 Beav. 201; see also *Hammond* v. *Maule*, 1 Coll. 281.)

Where the second exception will not apply.]—But this exception will not apply to cases where the principal itself is not bequeathed to the tenant for life; for if the tenant for life has only the interest or income bequeathed to him, and at his decease the principal is bequeathed to another, or if it appears from the general context of the will that no

interest in the capital was designed to pass until the determination of the life interest, the gift of the income and the gift of the principal will be construed as distinct gifts, and the bequest to the legatee will not become vested until the life interest is determined: (*Watson* v. *Hayes*, 1 Myl. & Cra. 125.)

Third exception.]—The third exception is where a legacy is engrafted by way of executory bequest to take effect on a contingent event defeating the first bequest; as where personal estate is bequeathed to A., and if he shall have no child who shall live to attain the age of twenty-one years, then to B., this interest so limited to B., although treated as contingent in some respects, yet in others is so far vested in him in right as to be transmissible to his personal representatives, the interests of the first and second taker being considered to vest at the same time. The consequence is, that if the second legatee dies whilst the event defeating the first bequest is in suspense, his representatives will, notwithstanding, be entitled to it, if such event should afterwards take place: (*Rammell* v. *Gillow*, 9 You. & Coll. 704; *Roberts* v. *Burder*, 2 Coll. 130.)

Exceptions to the rule with respect to vested legacies.]—And as, on the one hand, the rule with respect to contingent legacies has its exceptions, so, on the other, there are still more exceptions to the rule which construes a legacy as vested whenever the time of payment is separated from the gift; such last-mentioned rule being controlled by the intention of the testator, to which it is always subservient, so that if, from the general context of the will, it should appear that the testator meant the time of payment to be the time when the legacy should vest, the words "to be paid," or "payable at," or other terms of immediate gift being employed in the will, will be insufficient to rebut the construction that the time of payment is to form the essence of the bequest, until which period the legacy must remain contingent; and if, in case the legatee should die before that period arrives, he will take no interest in the legacy that will become transmissible to his personal representatives: (*Hunter* v. *Judd*, 4 Sim. 455; 1 Rop. Leg. 557, 4th edit.)

Second exception.]—The second exception to the rule of immediately vesting, is where the vesting of the legatee's shares in residuary personal estate is postponed until the death of an annuitant: (*Pearson* v. *Casamajor*, 8 Cl. & Fin. 74, n. (*a*); 1 Rop. Leg. 560, 4th edit.)

Third exception.]—The third exception is where the testator has shown a clear intention that the legacies shall not vest until his debts are satisfied, in which case the bequests will be contingent until the debts *might* have been paid upon a due administration of assets: (2 Wms. Exors. 883, 2nd edit.; 1 Rop. Leg. 560, 4th edit.)

Fourth exception.]—A fourth exception is where a testator has plainly and *with certainty* expressed his intention that the legacies shall not vest until his property has been sold, or realized, or gotten in by his executors, or laid out in a purchase. For if a testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to the property unless they live to receive it, there is no law against such intention being carried out if it be clearly expressed. Still it is essential, to bring a case within this exception, that the intention should be expressed with clearness and certainty; for although the payment of the legacies be expressly postponed until the testator's debts are discharged, or until the sale of an estate be effected, or until after the residue of personal estate shall be laid out in the purchase of lands, the bequests will only be treated as contingent until such time as the debts *might* have been paid, or the sale or purchase *might* have been effected upon a due administration of the effects of the testator. And a court of equity will inquire into what that period might have been, for that court will not suffer the rights of legatees to be prejudiced by fraudulent or unnecessary delays of executors or trustees: (2 Wms. Exors. 884.)

Fifth exception.]—The fifth exception is where the event upon which the legacy is payable is not certain of happening, or which the law for this purpose does not consider as certain or fixed; as upon the legatee's marriage, or his taking holy orders, which events may or may not happen; from whence it is presumed that the expectation of the one or the other of such events taking place, was the sole motive of attaching it to the bequest, and thus making it form its very essence: (*Atkins* v. *Hiccocks*, 1 Atk. 500; 1 Rop. Leg. 562, 4th edit.) So that whenever an event upon which a legacy is directed to be paid is uncertain as to its ever taking place, the legacy will not vest previously to the happening of that event; and in this respect it is perfectly immaterial whether the gift and the time of payment be in form distinct, or whether there be no gift except in the direction for the payment of the legacy (*Malcomb* v. *O'Callaghan*, 2 Mad. 349), since in either

instance the taking place of the event is a condition precedent to the vesting of the legacy, according to the maxim that "*dies incertus in testamento conditionem facit.*"

Intention of the testator must prevail, where it is manifest that he did not intend the legacy to be conditional.]—But even this maxim must yield to the intention of the testator where it is manifest it was not his intention that the legacy should be conditional: (1 Rop. Leg. 563, 4th edit.)

As to the vesting and devesting of legacies where they are subject to a limitation over.]—The effect of the vesting and devesting of legacies where they are subject to a limitation over has given rise to many difficult questions, but the general rule appears to be that a bequest over on a contingency does not of itself, and without more, prevent any of the shares of the legatees from vesting in the meantime, provided the words of the bequest are in other respects sufficient to pass a present interest (*Skey* v. *Barnes*, 3 Mer. 340), though such a devise over of the entirety may be called in aid of other circumstances to show that no present interest was intended to pass: (*ib.*; and see *Hunter* v. *Judd*, 4 Sim. 455; 2 Wms. Exors. 895, 2nd edit.)

The event on which the executory limitation depends must be clearly expressed.]—It is also necessary that the event upon which the executory limitation depends should be clearly pointed out, so as to enable the court to carry that intention into execution, otherwise the bequest over will fail altogether, and the first limitation become absolute. As, for example, suppose a testator, after an immediate gift to a legatee, should declare that if he (the legatee) die before he might have received the money, or before it might have been recovered (*Wood* v. *Penvyse*, 13 Ves. 395), the legacy shall go over to B., such intention with regard to the time B. is to take would be altogether so vague, that a court of equity would not venture to act upon it; consequently the interest would vest in the first legatee immediately: (1 Rop. Leg. 604, 4th edit.) But if the testator had mentioned *any time* which could have afforded some sort of rule to go by, and upon which the court might have acted, then his intention would have been allowed to prevail; as, if he had declared the bequest over should take place in the event of the legatee dying *before he received the property*, or *before the fund was actually realized* by the executor, in either of which cases

the executory limitation would have been good: (*Whiting* v. *Force*, 2 Beav. 571.)

First gift will not be devested unless the event upon which the executory limitation over is to take effect literally happens.]—And unless the event upon which the legacy is given over literally happens, the primary gift will not be devested; for where there are clear words of gift creating a vested interest, the court will never permit the absolute gift to be defeated unless it be perfectly clear that the very case has happened in which it is declared that the interest shall not arise. It must be determined on the *words of the will* that there was a vested interest, which was to be devested only upon a given contingency, and the single question is, whether that contingency has, or has not happened: (*Schnell* v. *Tyrrell*, 7 Sim. 86.)

In provisions for children subject to a prior life interest, the court leans in favour of the construction that will give them vested interests.]—In construing either a settlement or a will in which a provision is made for children subject to a prior life interest, the court leans strongly in favour of that construction by which the children will take a vested interest, at twenty-one or marriage, whether they survive the tenant for life or not; and if the instrument is incorrectly or *ambiguously* expressed, or if it contains conflicting or contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the rational presumption is that the child acquires a vested and transmissible interest at the period at which it is most needful; viz., at twenty-one, if a son, or on marriage or at that age, if a daughter: (*Torres* v. *France*, 1 Russ. & Myl. 649.) But where a testator has unequivocally expressed an intention that a provision to be made for his children shall depend upon their surviving both or either of their parents, the court must give effect to that intention, and can only lean to the presumption in favour of the children where the intention of the testator is ambiguously expressed: (*Bright* v. *Rowe*, 3 Myl. & Kee. 316.)

A legacy given to be at the absolute disposal of the legatee will confer the absolute interest.]—If a legacy is given generally to be at the disposal of the legatee, the bequest will become immediately vested and be transmissible to his personal representatives, whether he makes any disposition or not; nor will the circumstance of the particular mode of

disposition being pointed out, or even a limitation over of the legacy in case no such disposition should be made, in any way vary the rule; because the absolute interest in the fund having once vested, to which a power of spending or otherwise disposing of it is incident, the executory limitation over in case the legatee does not dispose of it, is a conditional defeasance repugnant to the original bequest, and cannot therefore be supported; consequently, the estate of the legatee not being devested, his personal representative will be entitled to the legacy if it be not received by the legatee during his lifetime: (*Comber* v. *Graham*, 1 Russ. & Myl. 450.) But where a particular estate, as for life, for instance, is limited to a legatee, with a power of disposition over the funds, it will not enlarge his particular estate, and if he fails to exercise his power of disposition, it will determine with his own life interest: (*Archibald* v. *Wright*, 9 Sim. 161.)

Where a legacy is given to be applied for a particular purpose, which fails, the legacy will become absolute.]—Where a legacy is given to be applied for a particular purpose which becomes incapable of being effected, the legacy will become absolute; as, where a testator bequeathed 30*l.* to A. for the purpose of binding him an apprentice, but who died before he attained a proper age to be so placed out, it was determined that A. took a vested interest in the legacy, which was transmissible to his personal representative: (*Barton* v. *Cook*, 5 Ves. 562.)

Direction that trustees shall apply a legacy for legatee's maintenance until he comes of age, and then to settle the same, will confer a vested interest.]—In case a legacy is given to trustees upon trust to apply the produce for the maintenance and education of the legatee until he attains twenty-one, and then upon trust either to apply the whole in such manner for his benefit, or to settle the same upon him in such manner as his trustees shall think fit, the legatee, on attaining twenty-one, will acquire such an interest as will be immediately transmissible to his personal representatives upon his death, or which he may dispose of by his will, although no settlement or other particular mode of applying the legacy is previously made: (*Campbell* v. *Brownrigg*, 1 Ph. 301.)

Power to affix the amount of shares amongst a class of persons will pass vested interests, subject to be devested on the execution of the power.]—Where legacies or portions are bequeathed amongst a class of persons in common, with

power in a third party to fix the amount of the shares, such shares will vest in each legatee immediately on the testator's decease, subject only to be devested by the execution of the power; and if the shares or portions are not to be enjoyed until after the death of the donee of the power, then such shares will vest in interest, subject to such devestment as aforesaid, not only in such of the legatees as shall survive the testator, but also in all such as shall answer the description, and shall come *in esse* during the lifetime of the donee of the power, provided all the legatees survive such donee; for if any of them die during the donee's lifetime, and before the execution of the power, the interest which vested in the deceased legatee will be devested if the donee appoints, as he may, the whole fund amongst the survivors: (*Boyle* v. *Bishop of Peterborough*, 1 Ves. 299; 1 Rop. Leg. 629, 4th edit.) But if no such appointment, or an imperfect or invalid appointment be made, then the representatives of a deceased legatee will be entitled to his share with the surviving legatees: (*Malin* v. *Keighley*, 2 Ves. 336, 506.)

Distinction where legacies are charged upon real estate.]—The whole of the preceding observations are only applicable to legacies arising out of personal property; for when legacies are charged on real estate, a totally different rule prevails. The reason of this diversity is, that where the charge is upon personal estate, courts of equity have adopted the rules of civil law, which, it seems, was at first introduced upon very slender reasons, and rather for the purpose of having a conformity in the decisions of the two courts having concurrent jurisdiction, than from any conviction of the soundness of the rules. But when a legacy is charged upon lands, over which the Ecclesiastical Court has no jurisdiction, courts of equity have not found themselves bound, for the sake of conformity, to adopt the same rule of construction, and have therefore required that the whole condition upon which the legacies or portions are given shall be complied with, viz., the attainment of the legatee to the age of twenty-one, &c.; nor do they admit of any exception, whether the legacies or portions were made payable at twenty-one, or with, or without interest: (1 Rop. Leg. 650.) So that if the legatee dies before the time of payment, the legacy will sink into the land for the benefit of the heir or devisee: (*Harrison* v. *Naylor*, 3 Bro. C. C. 108.)

Exceptions to the rule relating to the vesting of legacies charged upon real estate.]—But the rule relating to the

vesting of legacies charged upon real estate admits of an exception in those cases where the legacy or portion is postponed, not with respect to circumstances personal to the legatee, but with regard to the circumstances of the estate; as, for example, where a legacy, instead of being given to a person upon his or her attaining a particular age or day of marriage, which is merely personal to the legatee, is postponed until after the decease of a devisee for life of the lands charged with the payment of such legacies or portions, and which therefore relates to the circumstances of the estate, it must be inferred in the latter case that a benefit was intended for the legatee, and that the time of payment was delayed with a view only to the convenience of the estate, and not to prevent the legacy from vesting, so that in the event of the legatee's death during the continuance of the preceding life estate his personal representatives will, on the determination of that estate, be entitled to have the legacy raised for their benefit: (*King* v. *Withers*, For. 117; *Hawkins* v. *Phillipson*, 3 Myl. & Kee. 257.)

Rule may be controlled by testator's direction.]—It must also be observed, with respect to the above-mentioned rule, that it may be controlled by a direction in the will that the legacy shall not vest at the testator's death: (2 Wms. Exors. 301, 2nd edit.)

VI. CONDITIONS.

1. Conditions restricting alienation.
2. Conditions relating to marriage.
3. To assume testator's name and arms, or to reside on the family estate.
4. Not to dispute the validity of the testator's will.
5. Conditions for determining the gifts in the case of bankruptcy, insolvency, or other determination of the party's interest in the property.

1. *Conditions restricting alienation.*

When a testator wishes to annex any conditions to the devises or bequests in his will, it becomes important to ascertain whether they are such as can be possibly and legally carried out, for it is essential to the validity of a condition not only that it be such as to be naturally possible to be performed, but morally so also; consequently a condition to do an unlawful act will be void; neither can any condition be annexed to a limitation which is inconsistent

with the nature and quality of the estate (*Collins* v. *Plummer*, 1 P. Wms. 104); hence a condition annexed to a devise in fee that the devisee shall not alien, or to a devisee in tail, that the devise in tail shall not bar the entail will be void, as being inconsistent with, and repugnant to, the nature of those estates. But with certain restrictions, a condition against alienation may be good in either of the above-mentioned cases; as for example, not to alien for a particular time, as until the devisee attains to some specified age, or not to alien to some particular person, all of which conditions have been holden good (*Spittle and Davies' case*, 2 Leon. 38; S. C. Hob. 13, 261); as hath also a devise in fee upon condition not to alien, except to some particular person: (*Muschamp* v. *Bluet*, Bridg. Rep. 132.) And a tenant for life may be prohibited from alienating his life estate, and a married woman also may be prohibited from alienating her property during her coverture, although a general restriction against her alienation, where she takes an absolute interest in the property, would be void: (*Jones* v. *Salter*, 2 Russ. & Myl. 208.) And although during coverture equity will support the validity of a prohibition against alienation, yet the moment a married woman becomes discovert she has the same powers of alienation over the property as other persons: (*Woodmeston* v. *Walker*, 2 Russ. & Myl. 197.) But where a married woman takes only a life interest, then a proviso or condition for the cesser of her estate by alienation, either by her own act, or by operation of law, will be clearly valid, and may, under many circumstances, prove a useful provision, particularly where children are dependent upon their mother's life income for their support: (see forms of this kind 2 Con. Prec., Part VII., No. XL., clauses 3 and 4, p. 150, 2nd edit.)

Conditions usually annexed to gifts of real and personal estate.]—The usual conditions annexed to gifts of real or personal estate are either in favour, or restraint of marriage, or requiring the devisees to do or abstain from doing certain acts; as to assume the testator's name and arms, reside on the family estate, or not to dispute the validity of the will, or for avoiding the estate of the devisee upon the happening of certain events, as his becoming bankrupt or insolvent, or by the alienation, or other determination of his estate and interest in the devised premises.

2. *Conditions relating to marriage.*

There is a diversity in the construction of conditions relating to marriages, depending, first, upon whether the condition be precedent or subsequent; secondly, whether the property to which such condition is annexed consists of real or of personal estate.

Where marriage is a condition precedent.]—But whether the condition be annexed to real or personal estate, if marriage be made a condition precedent, it must be performed before the party claiming under it can become entitled (*Lloyd* v. *Brandon*, 3 Mer. 116); consequently, if the party die before the condition is performed, or if by any means the condition cannot possibly be performed, the gift must altogether fail (*Lowe* v. *Manners*, 5 B. & Ald. 517; *Long* v. *Ricketts*, 2 Sim. & Stu. 179); where a condition precedent becomes impossible, even though there be no default on the part of the devisee himself, the gift cannot take effect (*Bertie* v. *Falkland*, 2 Vern. 340), because the performance of the condition forms the very essence of the donation.

As to conditions subsequent.]—But where the performance of a condition subsequent becomes impossible, then the estate to which it was annexed becomes absolute, and the devisee will hold the property discharged from the condition altogether: (*Thomas* v. *Howell*, 1 Salk. 170; *Aislabie* v. *Rice*, J. B. Moore, 358; *Graydon* v. *Hicks*, 2 Atk. 16.)

Distinction as to the construction of conditions subsequent when annexed to real, or to personal estates.]—With respect to conditions subsequent annexed to bequests of real and personal estate, the diversity is, that where such a condition is attached to a devise of real estate, and there is a limitation over on breach of the condition, such limitation over will be in the nature of a conditional limitation, on breach of which the party to whom the lands are limited over will thereupon become entitled, without making either entry or claim upon the devised premises: (*Fry's case*, 1 Ventr. 199; *Anon.* 2 Mod. 7.) But if no estate be limited over, then it will be a condition at common law, of which, until recently, only the heir could have taken advantage; but now, under some modern enactments, a right of entry for condition broken may be either conveyed by deed (8 & 9 Vict. c. 106, ss. 5 and 6), or devised by will (1 Vict. c. 26, s. 2);

still no actual estate will be acquired under either of the above-mentioned enactments, until the heir, grantee or devisee shall make an actual entry on the premises; and unless such entry be made within twenty years after breach of the condition, such right of entry will be barred by the Statute of Limitations: (3 & 4 Will. 4, c. 27.)

As to personal estate.]—If the condition be attached to a bequest of personal estate, it will be regarded as *in terrorem* only, unless there be a limitation over upon breach of the condition: (*Lloyd* v. *Branton*, 3 Mer. 108; *Marples* v. *Bainbridge*, 1 Mad. 590.)

How far in terrorem doctrine extends to conditions precedent.]—And even in the case of conditions precedent, where the legacy is given upon marriage with consent, although the act of marriage itself is essential to the vesting of the gift, still, *unless there is a bequest over* upon marrying without such consent, the condition, so far as the consent is concerned, will be held to be merely *in terrorem*, and the condition as to the marriage to be sufficiently performed by the act of marriage alone. To this rule, however, there are the three following exceptions:—

First, where the legatee takes a substituted provision for the previous gift in case of marrying without such consent; as for example, a legacy of 10*l*. in lieu of a bequest of 100*l*.

Secondly, where the marriage with consent forms one of two alternate events, on either of which the legatee will become entitled; as marriage with consent, or on attaining a certain age, neither of which events take place, and in fact become impossible in consequence of the legatee marrying without consent, and dying under the required age: (*Hemmings* v. *Munckley*, 1 Bro. C. C. 314.)

Thirdly, where the marriage with consent is limited to the legatee's minority, which is but a fair and reasonable restraint, as marriage under age without the consent of parents and guardians is contrary to the political institutions of this country: (1 Jarm. Wills. 839.)

How far applicable to a residuary bequest.]—Neither, it seems, will a residuary clause in a will, simply as such, be considered in the same light as a positive bequest over, so as to render the condition effectual; but it will be otherwise if there is an express direction that the legacy on breach of the condition shall sink into and become part of the residue: (*Lloyd* v. *Brenton*, 3 Mer. 108.)

Requisition to marry with consent satisfied by a marriage with consent in the testator's lifetime.]—A requisition to marry with consent imposed by a testator on his daughters who were spinsters, was held not to apply to a daughter who afterwards married in the testator's lifetime, and was a widow at his decease: (*Crommelin* v. *Crommelin*, 3 Ves. 227.) To adopt a contrary construction would produce the absurdity of obliging the legatee to marry again in order to provide for her children (if any) by her former husband; and it seems that if, in such a case, a legatee marry with her father's consent, or even obtains his subsequent approbation, she will be entitled to all the benefit attached by him to marrying with the required consent (*Wheeler* v. *Warner*, 1 Sim. & Stu. 304), as it is impossible a testator could intend to place a daughter marrying with his own consent in a worse situation than if she had married with that of the trustees: (1 Hughes'Prac. Sales, 375, 2nd edit.)

As to conditions in restraint of marriage.]—With respect to conditions in restraint of marriage, these were prohibited by the civil law as being contrary to public policy, and were not looked upon in a much more favourable light by our own courts; although the latter did not adopt the rule to the unqualified extent laid down by the civil law, and have supported such conditions when confined within reasonable limits, and not used as a mere cover to restrain marriage generally, or amounting to an absolute injunction to celibacy. Hence a condition prescribing the ceremony and place of marriage has been holden good: (*Stackpole* v. *Beaumont*, 3 Ves. 98); still more so is a condition good which only limits the time to twenty-one, or any other reasonable age: (*Scott* v. *Tyler*, 2 Bro. C. C. 491.) An injunction to ask consent is lawful, as not restraining marriage generally: (*Sutton* v. *Jewkes*, 2 Cha. Cas. 95; *Hemmings* v. *Munckley*, 1 Bro. C. C. 304.) A condition prohibiting a woman from marrying is not unlawful (*Jordan* v. *Holkham*, Ambl. 209), neither is a condition not to marry some particular individual (*Jervoise* v. *Duke*, 1 Vern. 19), or one of a particular country, as a Scotchman or the like: (*Perry* v. *Lyon*, 9 East, 170.) Where the shares of children are to vest when they attain a certain age or marry with consent, it is sometimes provided, that in case they shall marry under the given age, without the consent of their guardian or guardians for the time being, that the trustees shall stand possessed of the share of any daughter so marrying for her separate use: (see the form

2 Con. Prec., Part VII., No. XL., clause 9, pp. 854, 855, 2nd edit.) Sometimes the interest of the child is made to cease altogether upon a marriage of this kind, or in case of marrying some particular person, or upon a marriage with a foreigner. In a case of the latter kind, it will be proper not only to set out the name of the country, but also, unless the testator should otherwise direct, to extend the description to a person born of parents of that country, either paternal or maternal, and notwithstanding such persons may afterwards become a denizened or a naturalized subject of this realm: (see the form 2 Con. Prec., Part VII., No. XL., clause 10, p. 854, 2nd edit.; *id. ib.* No. XLIX., clause 18, p. 25.) In cases of this nature a substituted gift is sometimes given in lieu of the benefit that is forfeited by the breach of the condition, as a sum of smaller amount than the original gift, or an annuity, either absolute, or, as is generally the case if the party is a female, for her separate use: (see the form 3 Con. Prec., Part VII., No. XLIX., clause 19, p. 25, 2nd edit.)

3. *Assumption of the testator's name and arms, reside on the family estate, &c.*

Practical suggestions.]—It is always proper, in those cases where a testator is desirous that the person succeeding to his property should also assume his name and arms, to prescribe some time within which this should be done (see the form 2 Con. Prec., Part VII., No. XL., clause 16, p. 858, 2nd edit.), otherwise is becomes difficult to determine within what period the devisee will be bound to perform the condition; nor is it by any means certain but that he would be allowed his whole lifetime for its performance. In *Gulliver* v. *Ashby* (1 W. Blackst. 607; S. C. 4 Burr. 1929), where lands were devised upon condition that the devisee assumed a certain name, the estate was held not to be forfeited by non-performance of the condition for three years after the property had devolved upon him, at which time he suffered a recovery, and thereby destroyed the condition altogether. And in another and more recent case (*Davies* v. *Lowndes*, 2 Scott, 67), where in the event of the testator's lawful heir not being found within a year after his decease, he devised certain lands to A., upon condition that he changed his name to S., and A. did not change his name to S. within the year, but he did so after the date of a final decree in a suit in Chancery, which gave him the possession of the property; this was held to be a sufficient compliance with the condition.

As to form of proviso for determining the estate upon breach of the condition.]—It is also a common practice to provide that in case the devisee shall refuse or neglect to assume the name or arms within the stated time, his interest in the property shall thereupon determine, as also that the party shall obtain an act of Parliament, or other license from the Crown, or take such other means as may be requisite or proper to authorize him to take such name and arms; for, unless this mode of procedure is prescribed by the terms of the condition, it seems that an unauthorized assumption of the name will satisfy a condition to assume and bear such name: (*Lowndes* v. *Davies*, 2 Scott, 71.) And even in a case where a condition was imposed upon devisees, *not bearing the name of Luscombe*, that within three years after being in possession, they should procure their names to be altered to Luscombe by act of Parliament, it was held that this requisition did not apply to an individual who, before he came into possession, had voluntarily and without any special authority assumed the name of Luscombe; he being, it was considered, a person "*bearing the name of Luscombe*," within the meaning of the will: (*Doe ex dem. Luscombe* v. *Yates*, 5 B. & A. 543; see also *Hawkins* v. *Luscombe*, 3 Swanst. 375.)

Condition should determine the whole estate.]—Mr. Fearne, in his valuable work on Contingent Remainders, has laid it down as a fixed rule of law that a proviso or condition for determining an estate must be so penned as to determine it altogether, and not avoid it in part only and leave it good for the residue. Hence, if such a condition is annexed to an estate tail, it would be incorrect to declare that upon breach of the condition the estate tail should cease, in the same manner as if the tenant in tail were dead; because his death would only cause a partial determination of his estate tail, which will not absolutely determine unless he left no issue capable of inheriting under it; but it should declare that the estate shall cease and devolve upon the person next entitled in remainder, in the same manner as if the person whose estate shall so cease was dead, and there was a general failure of issue inheritable under the estate tail so devised to him: (see the form 2 Con. Prec., Part VII., No. XL., clause 16, p. 859, 2nd edit.)

When conditions for abridging estates may be supported.] —This is certainly the case with respect to a condition properly so called, and of which none but the grantor or his

heirs can take advantage, and which must therefore necessarily determine the whole estate to which it is subject; but there appears to be no reason why this construction should be extended to a limitation which operates in defeasance of a preceding estate on the ground that it defeats the estate in part only; and it is observable in all the cases cited by Mr. Fearne in support of this doctrine (*Fox* v. *Hinde*, Cro. Jac. 697), the limitation was defective in the terms of its creation, or was repugnant to the nature of the incidents of the estate on which it was engrafted, or was contrary to the rules of law fixing the period within which such interests must be limited to arise. When, therefore, these circumstances do not occur, it seems that a condition, which provides that on the happening of certain events an estate tail shall be reduced to an estate for life only, may be good. This construction has been made in case of a condition annexed to a devise in fee simple (*Wright* v. *Wright*, 1 Ves. sen. 409); and upon the same principle also it seems it would be extended to a condition annexed to an estate tail. And where the limitation over is not to take effect until a certain period, the preceding estate will not be devested until that period actually arrives. Hence, where there was a devise to a wife, provided she remained a widow; but in case she married a second husband, then to testator's nephew when he should attain the age of twenty-three, it was held that the widow had an estate till the nephew attained the age of twenty-three, although she herself got married before that time: (*Doe ex dem. Dean and Chapter of Westminster* v. *Freeman*, 1 T. R. 389.)

Where the condition is to reside on the family estate.]—Sometimes a condition is annexed to a devise of real estate, requiring the devisee to reside on the family estate, or prohibiting him from residing abroad. Conditions of this kind are penned in the same form as those we have just before noticed, and, like them, should be so worded as to determine the whole estate: (see the form 2 Con. Prec., Part VII., No. XL., clause 17, pp. 860, 861, 2nd edit.)

It should be stated whether estates and interests created previous to the breach are to subsist or determine.]—In penning clauses of this kind it will be necessary to ascertain from the testator whether, in case the estate is to be determined by breach of the condition, any jointures, leases, or other estates or interest created by the party previous to the breach are to determine or to remain in force, and to

pen the clauses accordingly: (see the forms 2 Con. Prec., Part VII., No. XL., clauses 16 and 17, pp. 860, 861, 2nd edit.)

4. *Not to dispute the Validity of the Testator's Will.*

Conditions not to dispute the validity of the testator's will seem to be governed by the same rules as conditions in restraint of marriage, so that when annexed to personal estate they will be considered to be merely *in terrorem*, and unless the legacy be given over upon breach of the condition it will not be forfeited by contesting the will: (*Morris* v. *Burroughs*, 1 Atk. 404.) But this doctrine has never been applied to a devise of real estate: (see the form of condition, 2 Con. Prec., Part VII., No. XVI., clause 16, p. 712, 2nd edit.) Still, it seems that if a person has a claim under a will, and also a claim altogether independently of it, he will be obliged to elect between his original and substituted rights, and will not be allowed to accept the former unless he also consents to renounce the latter. Thus, where a testator had several daughters who had a claim under marriage articles, and also a claim under the will, and one of the daughters claimed not only under the latter, but under the articles also, it was held that she must either acquiesce under the will, or renounce all benefit therefrom: (*Noyes* v. *Mordaunt*, 2 Vern. 580.)

What will be sufficient to put a party to his election.]—An absolute power of disposition, and an intention to exercise that power, seems in general sufficient to raise an election of the above kind; therefore a devise to a testator's heir at law, which, prior to the statute 3 & 4 Will. 4, c. 106, s. 3, would have been inoperative (as the heir, whether disputing or admitting the will, must have taken by descent and not under the devise), would yet compel him to elect between the devised estate and claiming adversely to the will; and the estate which descended to the heir descended subject to this implied condition: (*Welby* v. *Welby*, 2 Ves. & Bea. 187.) It also appears to be immaterial whether a testator, in disposing of that which is not his own, is aware of the actual situation of things, or proceeds upon the erroneous supposition that he is exercising a power that actually belongs to him. Still, in order to raise a case of election, the intention must be clearly expressed; for equivocal or ambiguous terms will be insufficient; consequently, it has been held that a general devise of real estate is not a

sufficient indication of such intent, although the testator has no real estate of his own upon which the will can operate.

Heir when put to his election.]—Where lands have been attempted to be devised by a will incapable of passing them on account of its not having been attested according to the Statute of Frauds (29 Car. 2, c. 3), the heir claiming a benefit under it with respect to the personal estate, as to which it was really valid and effectual, would not have been put to his election, unless the will had contained an express condition not to dispute its validity; but if that clause had been inserted he must have then elected to acquiesce under all its dispositions, or to renounce all benefit under it: (*Carey* v. *Askew*, 1 Cox, 241.) But this doctrine is now only applicable to wills made prior to the year 1838, as the same formalities are required in a will made after that period to pass the personal, as the real estate: (1 Vict. c. 26, s. 9.) And no election will arise where a person under twenty-one years of age attempts to make any disposition by will, whether the property in question consists of real or of personal estate: (*ib.* sect. 7.)

Issue in tail.]—Issue in tail may be put to their election where the entailed estates are devised, and they claim as legatees under the same will: (*Herne* v. *Herne*, 2 Vern. 555.)

Widow when bound to elect.]—A widow also may be put to her election where she is entitled to dower, or a jointure, and is likewise a legatee under her husband's will, and she claims her legacy and her jointure, or her dower also, in opposition to the will: (*Chalmers* v. *Storil*, 2 Ves. & Bea. 222.) She has likewise been put to election between a devise or bequest, and the benefit to be derived from her marriage settlement, and that notwithstanding the will, as the law then stood, was incapable of passing real property: (*Newman* v. *Newman*, 1 Bro. C. C. 186.) In order, however, to preclude a wife from taking under her husband's will, there must be a plain intent to exclude her, the rule of equity being that a widow cannot be put to her election unless by an express declaration or necessary inference from the inconsistency of her claim with the dispositions of the will: (*French* v. *Davis*, 2 Ves. 577.) Consequently, if both may stand consistently together, she will not be bound to elect between them: (*Warburton* v. *Warburton*, 22 L. T.

Rep. 328.) Hence, a mere gift by a husband to his wife of a larger amount than her dower, will not put her to her election, but she will be allowed to claim both: (*Strathan* v. *Sutton*, 3 Ves. 249.) Nor does a bequest to a wife in bar, or satisfaction of her thirds, exclude her right and title as next of kin: (*Foster* v. *Cooke*, 3 Bro. C. C. 350; *Middleton* v. *Cater*, 4 *ib*. 409.) Neither does a bequest of the residue of personal estate, or of an annuity, bar her claim of dower: (*Thompson* v. *Nelson*, 1 Cox, 44.) And notwithstanding a testator has given a provision to the wife expressly in bar of any claim she might have against any other objects of his bounty, yet, if by any accident these objects should be unable to claim the benefit of that exclusion, no other person can set it up against the widow; as in a case where a testator gave his wife real and personal estate in bar of her dower and thirds, and bequeathed the residue to charities, which bequest was void under the Statute of Mortmain, it was held that the widow should not be put to her election: (*Pickering* v. *Samford*, 3 Ves. 332.) Whether a rentcharge, given to a widow issuing out of the lands from which she is dowable, will be sufficient to put her to her election has long been and still remains a doubtful point. Lord Northington (*Arnold* v. *Kempstead*, Ambl. 466), Lord Camden (*Villa Real* v. *Galway* (*Lord*), *ib*. 683; S. C. 1 Bro. C. C. 682), Sir Thomas Sewell (*Jones* v. *Collier*, Ambl. 730), and Mr. Justice Buller (*Wake* v. *Wake*, 3 Bro. C. C 225), seem to have considered a devise of this kind a satisfaction. But Lord Hardwicke (*Pitt* v. *Snowden*, mentioned 3 Ves. 392), Lord Bathurst (*Davis* v. *Edwards*, mentioned 1 Bro. C. C. 292), Lord Thurlow (*Foster* v. *Cooke*, 3 Bro. C. C. 347), and Lord Alvanley (*French* v. *Davis*, 2 Ves. 287), entertained a directly contrary opinion. Amidst so many conflicting authorities it is difficult to decide how the question really stands; but the prevailing opinion amongst the profession generally seems to be in favour of the wife. And even where a widow is bound to elect, she will be permitted to ascertain which fund it is most beneficial for her to take; and for that purpose she may file a bill to have the debts and legacies paid, and the funds clearly ascertained: (*Wake* v. *Wake*, 2 Ves. 255.)

As to children.]—Children also may be put to their election to choose between interests given them by will, and benefits which they are entitled to by settlement, when both claims are inconsistent with each other: (*Whistler* v. *Webster*, 3 Ves. 367.) But it seems that children will not be bound

by the election of their parents where their interests are distinct and separate: (*Ward* v. *Baugh*, 4 Ves. 623.)

As to creditors.]—Creditors may also be put to their election by a bequest inconsistent with the claim of their debts: (*Graves* v. *Boyle*, 1 Atk. 509.) And here it may be proper to remark, that election is a doctrine inapplicable as to the funds out of which the debts are to be paid. They are payable first out of the personal estate, and if that should prove insufficient for the purpose, the creditors may then resort to any other property liable to such payment: (*Kidney* v. *Consmaker*, 12 Ves. 154.)

Interest devised by the will, to be applied to compensate the disappointed devisee when the other party elects to take in opposition to the will.]—When a devisee or legatee elects to take in opposition to the will, the interest given him by such will is to be applied in compensation to the disappointed party: (*Anon.* Gilb. Eq. 15; *Ward* v. *Baugh*, *sup.*) But the estate thus taken in opposition to the will vests in the party with all its legal consequences. Hence, where a tenant in tail devised away the entailed estate, and gave the issue in tail, who was a married woman, and also to her husband, other benefits by his will, and she elected to take her estate tail, but her husband took under the will, and some time after this the wife died, upon which the husband entered as tenant by the curtesy, when it was contended, that as he took under the will, he could not claim in opposition to it, yet it was nevertheless ruled that the wife took the estate tail with all its legal incidents, and that consequently her husband, upon surviving her, became entitled to be tenant by the curtesy in right of her seisin, notwithstanding that he claimed in his own right under the will.

Practical suggestions.]—Notwithstanding the disappointed party will be entitled to compensation out of the interest given to the other party who elects to take in opposition to the will, the proper course, in all cases where there is a possibility that any devisee or legatee may set up any adverse claims to the will, is to provide that any parties setting up such claims shall forfeit all benefit under the will, and to declare expressly how the forfeited gifts are to be disposed of: (see forms of this kind 2 Con. Prec., Part VII., No. XL., clauses 1, 2, 12, 13, 15, pp. 849, 855, 857, 2nd edit.)

Where the trustees of the will are to be authorized to settle

disputes.]—In order to settle questions relating to the construction of the will, a clause is sometimes inserted authorizing the trustees themselves to determine these questions, with a condition for avoiding the bequests to such of the devisees or legatees as shall dispute their decision. In penning a clause of this kind, it may be prudent to add a proviso that the decision of the trustees shall be in accordance with the written opinion of counsel previously taken by such trustees. And it should also be clearly declared how the forfeited shares are to be disposed of: (see the form 2 Con. Prec., Part VII., No. XL., clause 14, p. 856, 2nd edit.)

5. *Conditions for Determining the Gifts in Cases of Bankruptcy or Insolvency, Alienation, or other Determination of the Interest of the Party in the Property.*

Practical observations as to conditions for determining the devisee's estate in case of his bankruptcy or insolvency.]—As a testator cannot by devising his estate deprive it of any of its legal incidents and properties, he is, in consequence, unable to limit it in such a manner as to be unaffected by the bankruptcy or insolvency of a devisee or legatee, a principle which is equally applicable to a life estate, as to a more extensive interest in the property; for bankruptcy or insolvency effects an immediate transfer by operation of law, vesting in the assignees whatever property remains in the bankrupt or insolvent at the time of his bankruptcy or insolvency: (*Snowden* v. *Dales*, 6 Sim. 524.) But although a testator is unable to settle his property so as to exempt it from the operation of the bankruptcy and insolvent acts, so long as any portion of such property remains vested in the bankrupt or insolvent, this does not prevent him from limiting the property in such a manner as to make the interest of the devisee or legatee to cease in case he shall become either bankrupt or insolvent; and it is perfectly reasonable that a testator should be enabled to shift the subject of his bounty to another, when its intended object is no longer capable of taking it: (1 Jarm. Wills. 824.) Nor, it seems, is there (as has been sometimes contended) any real distinction between a trust for a party until bankruptcy or insolvency, or a trust for a party for life, with a proviso for determining his life estate on the happening of either of those events, for in either case the proviso will be equally valid: (*Lockyer* v. *Savage*, 2 Str. 497.) And it appears that bankruptcy will be a forfeiture under a proviso pro-

hibiting alienation, if the terms of such proviso are sufficiently clear to show that the devisee's interest was to cease upon an alienation by operation of law (*Cooper* v. *Wyatt*, 5 Mad. 482); but unless this be clearly expressed, and in terms sufficient to embrace a compulsory alienation by law, as well as voluntary alienations by the act of the party, his being deprived of the enjoyment, either by bankruptcy, or being sued to outlawry, will not create a forfeiture: (*Lear* v. *Legatt*, 2 Sim. 479; S. C. 1 Russ. & Myl. 606.) But taking the benefit of an insolvent act cannot altogether be considered as a compulsory alienation by operation of law, as it originates in certain acts to be performed by the insolvent himself (such as filing his petition, schedule, &c.), and would therefore be treated as an act of alienation, when bankruptcy would not be so construed (*Lear* v. *Legatt*, *sup.*), unless the act of bankruptcy proceeded from the bankrupt himself by declaring his own insolvency, in which latter instance, it seems, the cases of bankruptcy and insolvency are not distinguishable, so far as acts of voluntary alienation are concerned.

Practical suggestions.]—In order to prevent all doubt or question upon the subject, the proper way, whenever it is intended that the benefit is to cease when the party upon whom it is conferred is no longer capable of enjoying it, is to make his interest determine, not only by his own voluntary acts of alienation, but also by compulsory acts of alienation by operation of law: (see the form of this kind, 2 Con. Prec., Part VII., No. XL., clause 5, p. 851, 2nd edit.; *id. ib.* clause 7, p. 852.)

To what extent conditions against alienation may be supported.]—We have already remarked that a restraint upon the power of alienating an estate of inheritance would be void as repugnant to the nature of the gift; a rule which extends equally to personal estate where the absolute interest is conferred in the property; yet, a restraint of the above kind may be annexed to a life estate in either real or personal estate; and a condition that such estate shall cease upon alienation, either by the voluntary act of the party, or by operation of law, will be supported. Clauses of this kind are not unfrequent where a provision is made for a party in the shape of an annuity, in which, to guard against the improvidence of the annuitant, the latter is restrained in express terms from anticipating the growing payments, and his or her entire interest is made to cease in case he should

attempt to do so; or if, by act of him or her, or by operation of law, the annuity becomes either wholly or partially vested in any other person: (see the forms 2 Con. Prec., Part VII., No. XL., clauses 5 and 6, pp. 851, 852, 2nd edit.) In cases also where property has been limited to the separate use of a married woman for life, a condition is sometimes annexed for determining her interest in case of her alienation. This indeed is the only means by which a woman can be altogether prevented from alienating property even when settled to her separate use, with an express restriction against her alienation, for this restriction is only operative during her coverture, so that the moment she becomes discovert her power of disposal is restored to her. But in those cases where she only takes a life interest, then a proviso for cesser of her estate, either by her own act, or by operation of law, will be clearly valid. A clause of this kind may indeed often be an important one where children are mainly dependent on their mother's life income for support, who by her folly or extravagance may either alienate her interest, or be deprived of all benefit from it, by operation of law. The best way of providing for a circumstance of this kind is to make the life interest to cease upon alienation or anticipation, by whatever means it may be effected, in the same manner as if the party were actually dead, and to direct that the trustees shall, during the remainder of such party's lifetime, pay or apply the income to or for the benefit of the person or persons who would for the time being be entitled thereto upon such party's decease: (see the form 2 Con. Prec., Part VII., No. XL., clause 3, p. 850, 2nd edit.)

VII. Provisions against Lapse.

Whenever a testator intends that any devised property shall not lapse but become transmissible to the devisee's representatives in case of her death in the testator's lifetime, it will be proper to insert an express clause to that effect: (see the form 2 Con. Prec., Part VII., No. XXI., clause 2, p. 736, 2nd edit.), otherwise, except in the instance of a child or other issue of the testator, the devise would fail if the devisees did not survive the testator. And this it will be proper to provide for, even in the cases of gifts to children or other issue of the testator, notwithstanding the provision of the statute 1 Vict. c. 26, "that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person,

shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator," unless a contrary intention shall appear by the will: (sect. 33.) Upon the construction of this statute it has been held that the issue are not merely substituted in the place of the predeceased devisee, but that the latter will take a fee simple conditional, depending either on his surviving the testator, or his leaving issue at the time of such testator's death; and the devisee may dispose of by will, notwithstanding he should die in the testator's lifetime: (*Johnson* v. *Johnson*, 3 Hare, 157; see also *Griffith* v. *Gale*, 12 Sim. 327; 1 Hughes Pract. Sales, 334, 2nd edit.) Nor does the enactment that a bequest to a child who died in the testator's lifetime, leaving issue living at the testator's death, shall not lapee, apply to a testamentary appointment: (*Griffith* v. *Gale*, *sup.*)

CHAPTER VI.

OF CHARGING DEBTS, LEGACIES, AND ANNUITIES ON THE REAL ESTATE.

I. As to Debts and Legacies.
II. Annuities.

I. As to Debts and Legacies.

The real estates of a deceased person were not, by the common law, liable to his simple contract, or even to his specialty debts, unless in the latter case the heir was expressly bound, and even then, the claim of the specialty creditor might have been defeated by the debtor devising away the lands, until the statute 3 & 4 Will. & M. put a stop to this, by giving the specialty creditor a right of action against the devisee concurrently with the heir. The statute 47 Geo. 3, c. 74, also went a step further than this, by letting in the claims of simple contract creditors of a deceased owner of real estate, who at the time of his death was amenable to the bankrupt laws (*Hitchen* v. *Bennett*, 4 Mad. 180); and by statute 3 & 4 Will. 4, c. 104, it is provided, "that after the 29th day of August, 1833, when any person shall die seised or entitled to any real estate, *which he shall not by his last will have charged with or devised subject to the payment of his debts*, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty, and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors, whether creditors by simple contract, or by specialty in which the heirs were bound; but the creditors by specialty in which

the heirs were bound are to be paid before creditors by simple contract in which the heirs are not bound."

Where real estate is expressly charged with the payment of debts, all the creditors will be entitled in pari passu.]—In case, therefore, the real estates are not expressly charged with the payment of debts, specialty creditors, whose security binds the heirs will be entitled to a preference over a creditor by simple contract, or by specialty not binding the heirs. But if the real estates are expressly charged with the payment of debts, then all classes of creditors will be entitled to payment *in pari passu.*

What words will be sufficient to create a charge on the real estate.]—The general rule with respect to the words sufficient to create a charge of debts and legacies upon real estate to be collected from the leading authorities upon the subject appears to be, that whenever there is a general direction that the debts and legacies shall be paid, and any disposition is afterwards made of real estates, that the real estates will thereby become charged with the payment of both the debts and legacies: (*Parker* v. *Marchant*, 1 You. & Coll. N. C. 290; *Shaw* v. *Bosser*, 1 Kee. 559; *Price* v. *North*, 1 Turn. & Phil. 84.) Whether such a charge would be created where the dispositions of the will are confined to personalty does not appear to have been yet decided, as in all the cases which have as yet occurred in which the question has arisen, the will appears to have embraced real estate; still, as a learned writer, when treating on this subject, remarks, "considering the strong tendency of the recent cases in favour of such charges, it seems unlikely that any distinction of this nature will be established:" (see Jarm. on Wills, 520.)

Rule will not apply where testator sets apart a particular fund.]—It appears that if a testator has provided any particular fund for the payment of his debts and legacies, that circumstance will be sufficient to rebut the inference of an intent to charge the whole of his property with these incumbrances (*Thomas* v. *Britnell*, 2 Ves. sen. 313); as where a testator, after directing that all his debts and legacies shall be paid, directs certain real estates to be applied for that purpose, in which the general charge by implication arising out of the introductory words will be controlled by the specific charge in the subsequent part of the will (*Braithwaite* v. *Britain*, 1 Kee. 206); but the appropriation of particular lands to the payment of debts and legacies, will

only rebut the implication of a general charge on the whole real estate, where such a charge is created by general or ambiguous expressions, and not where there is a clear charge made in express words upon the whole of the testator's real property: (*Crallan* v. *Dulton*, 3 Beav. 1.)

Whether a direction that debts shall be paid by the executors will rebut the implication of a charge upon the real estate.]—It seems, however, that if the debts are directed to be paid by the executors, it will be presumed that the payment is to be made by them exclusively out of the funds belonging to them in their representative capacity, unless the lands themselves are expressly devised to them: (*Warren* v. *Davies*, 2 Myl. & Kee. 49; *Wasse* v. *Hesslington*, 3 *ib.* 499.) But if the lands are devised to the executors, then a direction even to them to pay the debts or legacies will saddle the realty with the charge: (*Dover* v. *Gregory*, 10 Sim. 393; *Dover* v. *Gregory*, 9 L. J. (N. S.) 89, Ch.) Nor will the circumstance of the lands being devised for an estate tail exonerate the lands from the charge when so limited with a direction to pay the debts, although there should be several intermediate bequests between the gifts in tail and appointing the devisee in tail executor, and directing him to pay the debts; as, where a testator devised lands to A. *and the heirs of his body*, with remainder over, and in another part of his will gave to A. all the personal estate, and appointed him executor, *willing* him to pay the testator's debts, in which case it was held that the real estate was charged. But it is not so clearly determined whether a direction to an executor to pay the debts would charge the real estate, where the executor takes a mere life estate under the will, yet it seems that a limited estate devised to *one* of several executors in the testator's lands will not be charged with debts under a direction by the testator to pay them (*Keeling* v. *Brown*, 5 Ves. 359); nor, in fact, would even a devise in fee to one of several executors (*Warren* v. *Davies*, *sup.*), or a devise to the executors as trustees for other persons, produce this operation: (*Powell* v. *Wasse*, 3 Myl. & Kee. 496.) Nor will it be inferred that the testator intended to charge legacies upon his real estate, merely because he directs that his legacies shall be paid by his executor to whom he devises the *residue* of his real estate, and to whom he bequeaths the residue of his personal estate, after payment of debts and funeral expenses: (*Parker* v. *Fearnley*, 2 Sim. & Stu. 592; 1 Rop. Leg. 684, 4th edit.)

Where some legacies are charged on the land to the exclu-

sion of the others.]—It has sometimes happened, from the particular way in which the will has been worded, that some of the legacies thereby bequeathed have been made charges on the real estate to the exclusion of the others. Thus, in a case where a testator devised to his heir a part of his real estates, subject and chargeable with debts, &c. and all legacies *thereinafter* mentioned, that is to say, &c., giving several general legacies, all of which he directed to be paid by his said heir; but if no heir could be found, he devised those estates to a Mr. Lowndes, subject to and chargeable with all the legacies before mentioned. The testator next disposed of the remainder of his real property to charitable uses, and bequeathed some *other* legacies. Lord Thurlow determined that the last class of legacies was not chargeable upon the real estates: (*Hone* v. *Medcraft*, 1 Bro. C. C. 261.)

Where the devise is of the rents and profits only.]—Although a devise of the rents and profits was considered as a devise of the lands themselves, and to carry both the legal and equitable interest therein (*Doe* v. *Lakeman*, 2 Barn. & Ad. 421), yet some fluctuation of opinion appears to have been entertained as to whether a charge of debts and legacies on such rents and profits would have warranted a sale for the purpose of paying them. In some of the earlier cases, a distinction seems to have been taken as to whether such charges were to be satisfied within some fixed definite period, or where no time was specified for that purpose. In the former case, unless the charges could be satisfied within the time prescribed out of the rents and profits, a sale was allowed (*Gibson* v. *Montford*, 1 Ves. sen. 491; *Allan* v. *Backhouse*, 2 Ves. & Bea. 65); but if no time was specified within which the charges were to be paid, they could only have been satisfied by a gradual accumulation of the annual profits as they arose: (*Evelyn* v. *Evelyn*, 2 P. Wms. 659; *Mills* v. *Banks*, 3 *ib.* 1.) But for many years past the judges have inclined to treat a trust to apply the rents and profits in raising a sum of money, even at an indefinite period, as authorizing a sale: (*Booth* v. *Blundell*, 1 Mer. 233.)

Practical suggestions.]—Still, as questions arise, even at the present day, as to whether a mere charge of debts, legacies, or any other charge, authorizes the executors, either alone or together with the person or persons in whom the legal estate is vested, to effect a sale (*Gosling* v. *Carter*, 1 Coll. 644.); it will be prudent in every case, in addition to charging the real estate in aid of the personalty, to confer

an express power of sale upon the executors or trustees of the will. In addition to which, it will also be proper to authorize the executors or trustees to effect a sale, although the personal estate may not be gotten in; as also a clause exonerating the purchasers from inquiring as to whether the personal estate has been gotten in, or has proved insufficient for the purposes of the will (see the form 2 Con. Prec., Part VII., No. V., clauses 2, 3, 4, p. 652, 2nd edit.); for it has been held, that in the absence of a provision of this kind, the power of sale does not arise unless the personal estate should prove deficient; and it often happens, that the getting in the personal estate is attended with considerable delay and difficulty, during which time, if no such provisions as those we have just before suggested are inserted in the will, a purchaser could not, it seems, be compelled to take a title so circumstanced.

Alterations in law effected by the Wills Act, 1 *Vict. c.* 26.]—Prior to the statute 1 Vict. c. 26, although lands could not be charged with the payment of debts and legacies by a will that was not executed and attested as required by the Statute of Frauds (29 Car. 2, c. 3) for passing real estates, yet, when the lands were once so charged by a properly attested will, debts subsequently contracted, and new legacies, would have been included in such charge notwithstanding they were bequeathed by an unattested codicil (*Hannis* v. *Packer*, Ambl. 556; *Swift* v. *Nash*, 2 Kee. 20), or the personal estate might, by such a codicil, have been disposed of exempt from the debts and legacies: (*Coxe* v. *Bassett*, 3 Ves. 159, 164.) And in like manner the legacies given by the will might have been revoked, and others substituted in their place, by an unattested codicil: (*Attorney-General* v. *Ward*, 3 Ves. 327.) But with respect to wills made since the act of 1 Vict. c. 26, has come into operation (1st January, 1838), and which imposes a uniformity of execution in all testamentary dispositions, an unattested codicil would now have no operation whatever: (1 Vict. c. 26, s. 9.)

Proper course to be adopted where the intention is to exonerate the personal estate.]—If the testator intends to exonerate his personal estate from the payment of his debts and legacies, or from becoming the primary fund for discharging them, he should express that intent in the clearest terms, it being an established rule, that in the absence of a contrary intention the personal estate is the first and natural fund for

the payment of debts and legacies, and that the real estate is only to be resorted to in aid of the former; so that whether a testator devises his real estate to a person *upon condition* of his paying debts and legacies, or he charges them generally, or whether it be given to *trustees* (1 Bro. C. C. 454) for those purposes, and the personal estate is disposed of by a general residuary bequest (*Aldridge* v. *Lord Wallscourt*, 1 Ball. & B. 312), none of these circumstances will prevent the personal estate from being treated as the primary fund to be applied in satisfaction of all these demands: (*Philips* v. *Philips*, 2 Bro. C. C. 274; *Fitzgerald* v. *Field*, 1 Russ. 428.) Nor will the mere charge of funeral expenses on the real, exonerate the personal, estate. Two things, it seems, are essential to exonerate the personal estate; a charge on the land, and an intention to exonerate the personal estate. It is not sufficient to charge the real estate, but a testator must *show* that it was his purpose that *the personal estate should not be applied:* (*Samwell* v. *Wake*, 1 Bro. C. C. 144.)

Not necessary that the intent to charge the debts and legacies solely on the land should be manifested in express terms, where the intention can be collected from the general context of the will.]—Still, it is not absolutely necessary, in order to throw the whole burthen of the debts and legacies upon the land, that the testator's intention in this respect should be manifested in express terms; where such intention can be collected from a sound interpretation of the whole will that the fund intended for the payment of debts or legacies given out of or made chargeable upon the real estate, is that estate only. Hence, if legacies are given, and at the same time directed to be paid out of the real property (*Roberts* v. *Roberts*, 13 Sim. 336), or where real estate is given to A. either *in præsenti* or *in futuro*, he paying out of it certain legacies (*Ashby* v. *Ashby*, 1 Coll. (C.) 549; 1 Rop. Leg. 670, and the several authorities there referred to), the devised estate will be the only fund chargeable with such payment; because, in the first example given, the estate is expressly incumbered, and in the other, it is intended to be divided between the devisee and the legatees. So, where a legacy is given out of real property which a testator disposes of, not as the absolute owner thereof, but in exercise of a power of appointment, such appointed property will be the only fund liable to the payment of this legacy: (*Pawlett* v. *Pawlett*, 1 Vern. 321.) The real estate, also, will be the only fund charged, when it is given to trustees in trust out of the rents and profits, or

by a sale or mortgage of the premises, to raise and pay any *particular* sums of money.

Distinction between debts and legacies where specifically charged on real estate.]—But, in this respect, we must notice and always bear in mind, that there is a distinction between debts and legacies; for a trust to pay a particular specified debt out of real estate will not of itself exonerate the personalty from its liability (*Bickham* v. *Crutwell*, 3 M. & Cr. 763), although we have just before seen it will have that effect in the instance of a legacy. The reason of this distinction seems to be, that the liability to the legacy is created only by the will, whereas the debt is a charge on the personal estate independently of any direction in the will: (*Gittens* v. *Steele*, 1 Swanst. 29; *Spurway* v. *Glynn*, 9 *ib.* 483; *Hancox* v. *Abbey*, 11 *ib.* 179.)

Some legacies may be made payable out of real estate to the exclusion of the others.]—It occasionally happens that some of the legacies are charged on the land to the exclusion of others; as in a case where a testator devised lands subject to debts and all legacies *thereafter mentioned*, and then proceeded to give several legacies, all of which he directed to be paid by the devisee, and then devised the lands to the same person subject to all the legacies before mentioned, and finally disposed of the residue of his real estate, and then gave other legacies; it was held that these last legacies were not payable out of the real estate. The same rule seems to apply to those cases where the real estate is to be made the primary fund for the discharge of some particular debts and legacies; as where it is so constituted for the payment of debts and legacies generally. The intention must be as plainly expressed in the one case as in the other; but when so manifested, upon a sound interpretation of the whole will, as to show that the testator's intent is that one or more debts or legacies should be paid out of his real estate in the first instance, his personal estate will become exempted, notwithstanding there is a general charge of legacies upon the real estate, by which it would be only an auxiliary fund for the discharge of the other legacies in the event of a deficiency in the personal estate: (*Gittens* v. *Steele*, 1 Swanst. 24.)

Practical suggestions.]—In penning clauses of this kind, the safest plan will be to declare the testator's intention in express terms, and to set out whether the real estate is to be

the sole or primary fund for the payment of the charges, or is only to be chargeable therewith in aid of the personal estate, and thus, if possible, prevent any doubts or questions from being raised upon the subject: (see form of charge on real estate in aid of the personalty, 2 Con. Prec., Part VII., No. V., p. 649, 2nd edit.; *id. ib.* No. XXVI., clause 3, pp. 773, 774; also form of declaration that real estate is to be charged in aid only of the personal estate, *id.* Vol. III., Part VII., No. L., clause 4, p. 28.)

What persons are entitled to the benefit of the exoneration of the personal estate.]—The exoneration of the personal estate is presumed to have been intended as a personal benefit for the individual legatee, and not for the benefit of the estate generally; hence, if the personal estate be exonerated from the debts and legacies in favour of A., and he happens to die before the testator, by which means the disposition made to him becomes lapsed, the residuary legatees, or other persons who thereby accidentally become entitled to the fund, must take it with its primary and natural obligation to pay the debts and legacies: (*Hale* v. *Cox*, 3 Bro. C. C. 322.)

Real estate discharged from all further liability where money is raised and misapplied.]—Real estate, when charged with the payment of debts and legacies, will be liable to bear the burthen once only; and therefore, if the persons entrusted with the power to raise and pay the money, raise, misapply, and waste it, the creditors or legatees cannot resort to it again: (*Carter* v. *Barnardiston*, 1 P. Wms. 505, 518.)

As to devisees of equities of redemption.]—We have already noticed (*ante*, p. 764) that the devisee of any equity of redemption has no longer any right to come upon the testator's general personal estate in discharge of his mortgage debt.

How clause should be penned in the case of charitable bequests.]—When the real estate is charged with the payment of debts and legacies, and any bequests are to be made to charitable uses, these bequests should be expressly charged upon the personal estate (see the form 2 Con. Prec., Part VII., No. XXIV., clause 12, pp. 765, 766, 2nd edit.); because not only are gifts of this nature incapable of being charged upon the real estate (stat. 9 Geo. 2, c. 36, s. 1), but

are also liable to abate in proportion with other legatees on a deficiency of assets; whilst, on the other hand, assets will not be marshalled in their favour (*Makeham* v. *Hooper*, 4 Bro. C. C. 153); so that where the real estate is charged with the payment of legacies, but there is no direction that the charitable legacies shall be paid exclusively out of the personal estate, the other legatees will be entitled to come first upon the general personal estate *pari passu* with the charity legatees, and then to resort to the real estate to make up what the personal estate shall prove insufficient to satisfy; whereas the charity legatees will neither be entitled to come upon the real estate, nor to throw the other legacies upon that fund in aid of the personal estate, which is the only fund out of which the charitable legacies can be paid.

II. Annuities.

Whenever annuities are bequeathed, it should be expressly stated what fund is to be charged with their payment, and where both the real and personal estate are to be charged, it should be mentioned whether the real estate is to be primarily liable, or only to be applied in aid of the personalty. The omission to do this has proved a fruitful source of controversy. In several cases, the annuities have been held to be payable out of the testator's real estate, in aid of his personalty (*Lushington* v. *Sewell*, 1 Sim. 435; *Brown* v. *Claxton*, 3 *ib.* 225), and in other instances in exoneration of the personalty (*Welby* v. *Rockcliffe*, 1 Russ. & Myl. 571); whilst for many purposes an annuity is considered as a legacy (*Sibley* v. *Perry*, 7 Ves. 534), the rule being that an annuitant will fall under the general character of legatee, unless there is something to show the testator intended to distinguish between them: (*Attorney-General* v. *Jackson*, 2 Cr. & Jerv. 101.)

Annuitant has a right to come upon a policy of insurance in respect of premises charged with the annuity which have been burnt down.]—If premises charged with the payment of an annuity are burnt down, the annuitant has a right to come upon any moneys paid on account of any policies of insurance against fire which have been effected on the premises; and the sums so due have been ordered to be paid into court accordingly, the proceeds of the policy being considered a substitution for the property charged: (*Perry* v. *Ashley*, 3 Sim. 97; see also Ram. on Assets, 179, 180.)

Powers of distress and entry usually annexed to bequests of

annuities of large amount charged on real estate.]—Where an annuity of large amount is charged on the real estate, as where it is given as a jointure for the testator's wife, it is usual to annex to it powers of distress and entry: (see the form 2 Con. Prec., Part VII., No. XIV., clauses 3, 4, and 5, pp. 697, 699; *id. ib.* No. XXVII., clause 16, pp. 793, 794.) But it is the more frequent practice to omit the term for securing the charge; yet an important advantage is sometimes lost by so doing; because, where a term is limited to trustees, they are empowered to receive the rents accruing under any subsisting demises; whereas powers of distress and entry conferred by will are inoperative against tenants holding under any demises subsisting at the time of the testator's death; added to which, the trustees taking an actual estate under the term, are better enabled to deal with the property by granting leases, or exercising other acts of ownership over it, than where they get into possession under a mere power of entry.

Powers of distress frequently omitted where the annuities are of small amount, or where they are not solely charged on the real estate.]—Where annuities of small amount are charged, particularly when bequeathed to several individuals, and more particularly when charged both on the real and the personal estate, the powers of distress and entry are usually omitted: (see the form 2 Con. Prec., Part VII., No. XV., clause 11, p. 706, 2nd edit.)

The mode in which trusts for securing annuities should be penned will be discussed in the next chapter.

CHAPTER VII.

TRUSTS AND POWERS.

I. TRUSTS AND POWERS USUALLY CONTAINED IN WILLS OF REAL AND PERSONAL ESTATE.

1. Trusts and powers of sale.
2. For collecting and getting in of the estate.
3. Trusts for investment.
4. Trusts for accumulation.

5. For keeping premises in repair, making improvements, renewing leases, effecting insurances, &c.
6. Trusts and directions for carrying on a trade or business.
7. Trusts for raising funds for securing annuities.
8. For the separate use of married women.
9. For wife and for children.

1. *Trusts and Powers of Sale.*

How the trust estate should be limited to the trustees.]—We have already noticed (*ante*, p. 796), that whenever property is given to trustees it should be limited to them as joint tenants, and two trustees at least ought to be appointed, so that in case of the death of either of them the whole trust estate may still survive to the surviving trustees or trustee: (see the form 2 Con. Prec., Part VII., No. I., clauses 2 and 3, p. 633, 2nd edit.; *id. ib.* No. II., clauses 1, 2, 3, pp. 641, 642; *id. ib.* No. III., clause 1, p. 644.) If trustees are to be invested with a power of sale, the power ought to be extended to the survivors and survivor, and the representatives of such survivor; for it has been decided that a power of sale given to several persons by name cannot be exercised by the survivors: (*Bradford* v. *Balfield*, 2 Sim. 264.)

Propriety of limiting trusts or powers of sale to the personal representatives of surviving trustee.]—It will also, in most instances, be advisable to limit the trusts or powers of sale to the executors or administrators of the surviving trustee omitting the heirs altogether: (see the form 2 Con. Prec., Part VII., No. I., clause 4, p. 633, 2nd edit.) This plan presents two obvious advantages. In the first place, if the trust property consists of real and personal estate, and is limited to the heirs, executors, or administrators of the surviving trustee in case of his death, the trusts and powers relating to two kinds of property would thereby become separated, those relating to the real becoming vested in the heir, and those relating to the personalty, in the executors or administrators. And in the second place, even if the property consisted wholly of real estate, the trusts might become vested in a lunatic, or an infant heir, both of whom, although now empowered to convey by the direction of the Court of Chancery, cannot be thus authorized without considerable expense being incurred, which every possible care should be taken to avoid.

Executors, although renouncing, may nevertheless exercise a

power of sale limited to them by the will.]—It may also be proper to remark here, that executors are not disqualified from exercising a power of sale contained in a will by renouncing the probate of such will and the office of executorship: (*Denne* v. *Judge*, 11 East, 288.)

Practical suggestions for penning trusts for sale.]—Trusts for sale generally direct that the sale is to be made as soon as conveniently may be after the testator's decease: (see the form 2 Con. Prec., Part VII., No. 1, clause 4, p. 633, 2nd edit.) But if any portion of the trust property is reversionary, it will always be advisable to provide, that no sale should be made of that portion of the property until it should fall into possession, unless the trustees should deem a prior sale expedient: (*id. ib.*) Reversionary interests generally sell at a disadvantage, particularly where an immediate sale of them is required, and by penning the clause in this manner the trustees may either postpone or accelerate such sale, accordingly as they may consider it most advantageous for the trust estate. The trustees should be authorized to effect the sale either by public auction or private contract, and be also empowered to buy in and resell the premises at any future sale or sales without being responsible for any loss that may be thereby incurred. It seems also to be generally advisable to authorize the trustees to limit the purchased property to such uses as the purchasers shall direct; for where it is merely declared that they may appoint to a purchaser in fee, a doubt has been expressed as to whether this would warrant a conveyance to uses to bar dower, or any other special uses which a purchaser might require.

As to copyholds.]—When any copyholds are intended to be sold, the most advantageous course seems to be to give the trustees a mere authority to sell, and not to vest any estate or interest in them separate from the power. By adopting this plan, the purchasers in whose favour the power is to be exercised will be in under the will, and thus one admission fine only will be incurred: (see further observations on this subject, *ante*, p. 760.)

Indemnity clause in favour of purchasers ought always to be inserted.] — A clause also should always be inserted declaring that the trustees' receipts shall be a sufficient discharge to purchasers, and also exonerating the latter from all responsibility with respect to the application of the

purchase moneys: (see the form 2 Con. Prec., Part VII., No. I., clause 8, p. 636.) This clause ought never to be omitted, because in some instances purchasers are obliged to see to the application of their purchase money; as, for example, where lands are devised to be sold and the proceeds applied in payment of debts expressly mentioned in the will, or set out in a schedule, unless the will contains an express clause exempting purchasers from this responsibility: (*Page* v. *Adams*, 10 Law Journ. N. S. 107.) But if the lands are devised for the payment of debts generally, or upon trusts to pay debts and legacies, then the trustees may also sell in order to pay them, so that unless the particular debts are specified the purchaser is, from necessity and general convenience, exempted from the obligation of seeing to the application of the purchase money: (*Barker* v. *Duke of Devonshire*, 3 Mer. 310.)

How clause of indemnity ought to be penned.]—In the clause of indemnity to the purchasers it will be better to state that the receipt or receipts of the trustees or trustee for the time being shall be sufficient discharges; for if the names of the trustees be inserted, then, it seems, every trustee who has accepted the trust must join in the receipt of the purchase money, although he may have released his estate to the other trustees, because, notwithstanding the release of the legal estate to his cotrustees, he cannot delegate the personal trust and confidence reposed in him. But a clause arranged like the one above suggested will render it unnecessary for any trustee who has released to join in any receipt. And there cannot be the slightest ground to contend that a personal trust or confidence was given to the trustees named in the instrument creating the power, and therefore the receipt of the trustees acting in the trusts for the time being, would satisfy both the words and the spirit of the clause: (see the form 2 Con. Prec., Part VII., No. I., clause 9, p. 630, 2nd edit.; *id. ib.* No. II., clause 7, p. 643; *id. ib.* No. III., clause 4, p. 645; *id. ib.* No. VIII., clause 6, p. 664.)

As to trusts for sale of advowsons.]—Advowsons may be devised upon trusts for sale as well as any other kind of property; but as an advowson cannot be sold during an avoidance, if the testator is both the patron and incumbent it will be necessary to direct the trustees to present some person of advanced age, and as soon as he is inducted into the living to sell the advowson, with the same powers of

buying in and reselling and giving receipts to purchasers as in ordinary sales by trustees: (see the form 2 Con. Prec., Part VII., No. IV., pp. 646, 648, 2nd edit.) The trustees may safely venture to carry out these trusts, but they must be careful not to exceed them; and, for the sake of increasing the testamentary estate, by obtaining an increased price, or any other purpose whatever, enter into any simoniacal contract with respect to the resignation of any person they may present in favour of any purchaser or his nominee, as an act of this nature would be a clear breach of trust, which no pecuniary advantage that might thereby result to the trust estate could possibly extenuate.

2. *Trust for the collecting and getting in of the Estate.*

Trusts for collecting and getting in the estate are sometimes connected with, and sometimes distinct from, trusts for sale. As trusts of this kind are usually penned, they direct the trustees to sell and convert into money all such part of the trust estate and premises as shall not consist of money, and to collect and get in such parts of the trust estate as shall consist of money: (see the form 2 Con. Prec., Part VII., No. II., clause 4, p. 642, 2nd edit.) If combined with trusts for sale of premises expressly devised to trustees for that purpose, the clauses authorizing the trustees to effect the sale by public auction or private contract, with power to buy in and re-sell the premises, give receipts to purchasers, and enter into all necessary contracts and conveyances, should be superadded to the clause: (see the form 2 Con. Prec., Part VII., No. I., clause 6, pp. 634, 635, 2nd edit.) To these should be annexed a clause giving the trustees a discretion to wind-up, settle, and adjust all the testator's accounts, compound all debts and claims due and owing to him, and to give time for payment, or take personal or such other security for such payment as they may think fit, and also to refer any disputed claims to arbitration, and this whether there shall or shall not be any legal proof of such claims: (see the form 2 Con. Prec., Part VII., No. II., clause 5, p. 643, 2nd edit.; *id. ib.* No. III., clause 2, p. 644; *id. ib.* No. VIII., clause 5, p. 664.) This clause is a very important one, as it enables trustees to use a discretionary power, which may often prove advantageous to the estate, whilst at the same time it relieves them from being responsible for any losses to which they may have rendered themselves liable for not acting in accordance to the strict letter of the law.

As to power to sell upon credit.]—It is also sometimes advisable to give trustees or executors a power to sell upon credit; but this power is usually confined to chattels personal, and rarely made to extend to leasehold property or real estate: (see the form 2 Con. Prec., Part VII., No. III., clause 2, p. 644.) Under the above-mentioned restrictions, it may sometimes prove useful, where a testator has the fullest confidence in the judgment and integrity of his trustees; for advantages may doubtless be sometimes obtained by selling goods upon credit; still, for all this, a trustee or executor who presumes to do so without an express authority for that purpose, will render himself personally liable for the whole amount of any loss to the estate which may be thereby incurred.

3. *Trusts for Investment.*

In penning trusts for investment, the securities in which such investment is to be made should be distinctly stated; for where there are no directions as to the fund, the Three per Cents. are the only security which trustees can adopt with perfect safety to themselves (Hill on Trustees, 374); and even where trustees have a discretionary power conferred upon them to invest money upon securities, this will not authorize them to lend the money upon personal security, unless personal security be expressly mentioned, or clearly implied in the authority given to them (*Pocock* v. *Reddington*, 5 Ves. 794); and notwithstanding the expressions used may be general enough to include all securities, it would not justify the trustees in investing in securities of this nature: (*Wilkes* v. *Steward*, Geo. Coop. C. C. 6.) And even where the authority expressly mentions personal security, that does not enable the trustees to accommodate a trader with a loan upon his bond. Where, however, a discretionary power is given to the trustees to invest, in the alternative, in real or personal security, they will be justified, as against *legatees* or other *volunteers*, where, in the exercise of a sound discretion, they lend the trust moneys to an apparently responsible person at a reasonable interest: (*Forbes* v. *Ross*, 2 Cox, 116.) But it seems that this rule would not prevail as against creditors: (*Doyle* v. *Blake*, 2 Sch. & Lef. 239.) A power to trustees to invest "on good private security," does not warrant them retaining the fund in their own possession, and using it for the purposes of their business; and under such circumstances they have been charged five per cent. interest: (*Westour* v. *Chapman*, 1 Coll. 177.) A trust to invest on good freehold security can only be executed by

an investment of that description (*Wyatt* v. *Willis*, 8 Jur. 117); and where the alternative is to invest in land or any other security, the investment in land will be taken as the one the settlor or testator primarily contemplated, unless the nature of the trust forbids the adoption of that construction. The lending trust moneys on leasehold property, without a special authority to that effect, would be a clear breach of trust, for the consequences of which the trustees would render themselves personally responsible: (*Fyler* v. *Fyler*, 3 Beav. 550; *Fuller* v. *Knight*, 6 *ib*. 205.) A trust to invest in Government securities has been held not to authorize an investment in Exchequer bills (*Ex parte Chaplin*, 3 You. & Coll. 396); and an investment in South Sea stock (*Trafford* v. *Boehm*, 3 Atk. 444; *Howe* v. *Earl of Dartmouth*, 7 Ves. 150), or Bank stock (*id. ib.*), or India stock (*Powell* v. *Cleaver*, 7 Ves. 142, n.), though practically as safe as any Government security, is not regarded by the court as a proper disposition of the trust funds, and upon acquiring judicial cognizance of the existence of such securities, the court will order them to be sold and invested in the Three per Cents. Consequently, should any loss be occasioned to the trust estate by the fluctuation or depreciation in value of those securities, the trustees would be decreed to make good the loss: (*Clough* v. *Bond*, 3 Myl. & Cr. 496.) In fact, if trustees choose to invest in securities not expressly authorized by the trust, and not sanctioned by the practice of the court, it will be done at their own risk, and they will be held liable to make good any loss occasioned by such an investment; whilst, at the same time, they will be held accountable to the *cestuis que trusts* for any profits arising from the same source (*Wedderburn* v. *Wedderburn*, 2 Kee. 722), and thus they will incur a double degree of responsibility without acquiring any personal advantage whatever.

As to railway, bridge, and navigation shares.]—The abovementioned remarks apply with equal, if not greater force, to railway, bridge, navigation shares, and other securities of a like nature, and still more to the public funds of any foreign state; so that if trustees adopt any of such investments, they will do so upon their own personal responsibility. Still, there is nothing to prevent a testator from allowing his trustees to invest the trust moneys in any of the above-mentioned securities, provided he expressly authorizes them to do so: (see the form 2 Con. Prec., Part VII., No. XXX., clause 5, p. 809, 2nd edit.)

As to investments in Irish securities.]—The act 4 & 5 Will. 4, c. 29, and which is retrospective in its operation, authorizes an investment in real securities in Ireland wherever the will contains a general power to invest in real securities in England or Wales, or Great Britain, or in real securities generally; so that whenever a testator does not really intend the power of investment to include Irish securities, it will be necessary to negative that authority in express terms: (see the form 2 Con. Prec., Part VII., No. VI., clause 14, p. 657, 2nd edit.)

As to the receipt clause and indemnity to borrowers.]—In trusts for investment it is both usual and proper to insert a clause that the trustees' receipts shall be a sufficient discharge to the borrowers of the trust funds; still this is not really essential; because an authority given to a trustee to lay out and invest the trust money empowers him to do all acts essential to such a trust; and it therefore necessarily enables him to give sufficient discharges to the borrowers of the money upon calling it in (*Wood* v. *Harman*, 5 Mad. 368), without the necessity of any concurrence of the persons beneficially interested in the trust fund.

Costs of investment.]—Where a specific sum, as 2,000*l.*, for instance, is given by the will to trustees upon trust to invest, the costs of the investment, in the absence of any express directions, must be defrayed out of the particular sum, and will not fall upon the testator's general estate: (*Gwyther* v. *Allen*, 1 Hare, 505.)

As to changing and varying of securities.]—Where trustees are directed to invest, and it is intended that they shall have a power of varying securities, it should be so specified in the will, and also the nature of the securities to which this power is to extend. If any of the funds are already in a state of investment, and the testator is not desirous of changing the security, or is willing that the trustees shall have a discretionary power in this respect, it will be proper to confer this power in express terms: (see the form 2 Con. Prec., Part VII., No. XXX., clause 5, p. 809, 2nd edit.) This is particularly important where the trust fund is already invested on personal or other securities, a variation of which would not be sanctioned by the court; as in such cases it often becomes difficult to determine how far it is the duty of the trustees to allow such investments to continue, or to call them in and lay out the proceeds in some more proper

investment. If there be an express trust for the calling in and conversion of the securities, it is perfectly clear it will be the duty of the trustees to act upon that direction, and the neglect to do this will be a clear breach of trust: (*Bullock* v. *Wheatley*, 1 Coll. 130.) But where there is no actual direction for the conversion of the existing securities, which, on the contrary, are specifically given to the trustees to be held and applied by them upon the trusts declared, the continuation of the property in its existing state must necessarily have been contemplated by the testator, and may therefore be properly permitted by the trustees, unless some reasons arise for calling it in which did not exist when the trust was created: (*Lord* v. *Godfrey*, 4 Mad. 455.) But where no such specific mention is made of the securities, and there is nothing in the will from whence it may be inferred that the trusts were intended to apply to the property in its actual state, the trustees, in the absence of an express authority from the testator, would incur considerable risk in permitting any portion of the trust estate to remain unnecessarily outstanding on imperfect security. Nor would the circumstance that the testator himself had considered the existing securities as a sufficient investment, afford a valid reason or excuse for their so doing: (*Bullock* v. *Wheatley*, 1 Coll.) If trustees or executors have no express authority from the testator to allow his trust funds to remain in their present state of investment, it will become their duty to call in all such securities as they may find outstanding on mere personal security, although no specific direction to that effect is contained in the will: (*Lowson* v. *Copeland*, 2 Bro. C. C. 15.) In like manner it has been held incumbent on them to transfer into the Three per Cents. any funds which they may find invested in other than Government stock (*Holland* v. *Hughes*, 16 Ves. 114); and this rule, it seems, has been even held to apply to stock of so undoubted a character as Bank or India stock (*Howe* v. *Earl of Dartmouth*, 7 Ves. 149), and of course would prevail still more strongly with respect to foreign stock, or shares in public companies: (Hill on Trustees, 379.)

Trustees have no power to change investments without proper authority.]—Where money is already invested, trustees cannot change it without proper authority. The power to change the securities is often quite as important a one to the trustees as giving them a discretion to permit them to remain in their existing state of investment; this is particularly the case where the trust moneys are invested in stock,

for if once properly so invested, the trustees will not be justified, in the absence of an express authority for the purpose, in selling out the stock and investing in other securities; if they do so, they will be decreed instantly to replace it, and if the stock be replaced for a less sum than that for which it was sold, to invest the surplus in the same stock to the same uses: (*Williams* v. *Nixon*, 2 Beav. 472.)

Where the trustees are not to be authorized to vary securities unless with consent of some particular persons.]—If the trustees are not to vary the securities except with the consent of some particular person or persons, it should be so expressed in the will. The most general practice seems to be to require that such consent should be in writing: (see the form 2 Con. Prec., Part VII., No. VI., clause 15, p. 657.) Where the consent of more than one person is to be required, then the practice is to extend such required consent to survivors or survivor.

Power to vary securities does not empower trustees to affect the relative rights of cestuis que trusts.]—It will be proper, also, to remark here, that a general power of varying securities does not empower trustees, by the exercise of their power, to vary or affect the relative rights of the *cestuis que trusts*. Hence, where a testator made a specific bequest of a sum in Long Annuities, producing 365*l.* per annum, in trust for his wife for life, with remainder over, and gave to trustees the usual power of varying the trust securities, it was nevertheless held that this power did not enable the trustees to diminish the income of the tenant for life, and increase the value of the gift to the remainder-men, by disposing of the Long Annuities and laying out the money in the Three per Cents.: (*Lord* v. *Godfrey*, 4 Mad. 455.) And, upon the same principle, it seems that the relative interests of the *cestuis que trusts*, or their real or personal representatives, could not be affected by a change of real estate into personal, or *vice versâ*: (Hill on Trustees, 496; *Walter* v. *Maude*, 19 Ves. 424.)

As to indemnity clause exonerating trustees against involuntary losses.]—Trustees being personally responsible for losses incurred by the failure of any banker, broker, or other person in whose hands any of the trust moneys may be deposited for safe custody or otherwise (*Macdonnell* v. *Harding*, 7 Sim. 178; see also Hill on Trustees, 370, and the several cases there referred to), as also in most, if not in every case, for the suffi-

ciency of any stocks, funds, or securities in or upon which such trust moneys may be invested (*Stickey* v. *Sewell*, 1 Mees. & Cr. 8), it has become the general practice to insert a clause in all regularly drawn wills and settlements, that the trustees are to be exonerated from all losses sustained by any of the above-mentioned causes, unless through their own wilful default or negligence: (see the forms 2 Con. Prec., Part VII., No. I., clause 11, p. 638, 2nd edit.; *id. ib.* No. VIII., clause 7, p. 665.) How far this will be an effectual indemnity to the trustees is at least doubtful. It will certainly afford them no protection, if there has been any negligence or carelessness on their part; nor will the clause exonerate them from the consequences of a breach of trust in neglecting to convert and invest, in pursuance of the trusts and directions contained in the will or other instrument by which such investment is directed: (*Mucklow* v. *Fuller*, Jac. 198.)

4. *Trusts for Accumulation.*

Trusts for accumulation were formerly considered to be good, provided they did not exceed the limits which the law allows for the vesting of an executory devise, viz.: the duration of a life or lives in being, and one and twenty years afterwards, a child *in ventre sa mere* for this purpose being considered as a child actually born (*Cadell* v. *Palmer*, 7 Bligh, N. S. 102); nor was the number of persons in existence at all material, because they were considered in the same light as so many candles all burning at the same time, so that whether it depended upon one life or a score of lives or more, was totally immaterial; nor was any inconvenience ever found to result from this rule until the will of Mr. Thellusson, a wealthy merchant, directed the attention of the legislature to the mischiefs which might possibly be introduced by allowing testators such an unreasonable power of tying up their property: (*Thellusson* v. *Woodford*, 4 Ves. 527; 11 Ves. 111; 1 Bos. & Pull. 357.) The testator in the case above alluded to had three sons, to whom he gave some insignificant legacies, which, he observed, with their very great success in trade would be sufficient to procure them comfort; but the rest of his immense property, consisting of lands of the annual value of 4,000*l.*, and 600,000*l.* in personal property, he devised to trustees in trust that they should receive the rents, issues, and profits, and dispose of them for the purposes of accumulation during the lives of his three sons, and the lives of all their sons, who should be living at the time of his death,

or born in due time afterwards, and during the lives of the survivors and survivor of them. And he directed that after the decease of the survivor of such persons, the accumulated fund should be divided into three shares, and that one share should be conveyed to the eldest male lineal descendant of each of his said three sons; and upon failure of such a descendant, the share to go to the descendants of his other sons; and upon failure of such male descendants, he directed all the accumulated property to be applied to the use of the sinking fund. At the time of his death the testator's three sons had four sons living, and two other twin sons were afterwards born, who were *in ventre sa mere* at the time of the testator's death. It was calculated that at the death of the survivor of these nine persons, the accumulated sums would amount to about 19,000,000*l.* sterling, and if, at that time, there should be only one male descendant, and he should continue a minor for ten years longer, the whole would amount to about 32,000,000*l.* before any part of it could be alienated. All of which vast wealth was to be accumulated for the benefit of unknown descendants, to the exclusion of every one of his children or their issue who were in existence at the same time with himself. Lord Loughborough, Lord Alvanley, then Master of the Rolls, and Justices Buller and Lawrence, were unanimously of opinion that the period of accumulation in this case was not more extensive than had been established in former cases, and that it was within the precise limit and boundary of executory devises, as these nine lives were all wearing out at the same time, and that in reality the property was rendered unalienable only during one life, that of the survivor of the nine; and, therefore, they held themselves bound by force of the authorities to decide in favour of the validity of the will. This decision was afterwards affirmed in the House of Lords.

Statutory enactments for the purpose of limiting time of trusts for accumulation.]—This will having been considered as an abuse of the rules of law, although it contrived to keep within the letter, the statute 39 & 40 Geo. 3, c. 98, was passed, by which, after reciting that it is expedient that all dispositions of real and personal estate, whereby the profits and produce thereof are postponed, should be made subject to the restrictions thereinafter contained, enacts, "that no person or persons shall, after the passing of this act, by any deed, will, codicil or otherwise, settle or dispose of any real or personal

property so and in such manner as that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer period than the life or lives of the grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or *in ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities of any person or persons who, under the uses or trusts of the deed, will, or other assurance directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulations shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, and the profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go and be received by such person or persons as would have been entitled thereto if no such accumulation had been directed." The act however contains a proviso that it is not to extend to provisions for the payment of debts or portions for children: (sect. 3.)

Thellusson's Act only affects the income directed to accumulate.]—It must also be observed that the above-mentioned act does not affect the rule relating to the property or principal itself, but merely regulates the extent to which the income may be accumulated, consequently an executory devise of real estate, or an executory bequest of personal property may still be good, if limited upon an event which must necessarily happen within the compass of a life in being and twenty-one years afterwards, although the act expressly restricts a trust for the purpose of accumulation to the life of the grantor or testator, or twenty-one years after his decease, or during the minority of any person living at his death or then *in ventre sa mere*, or during the minority of any persons who, for the time being, would be entitled to the rents, &c., if of full age. It appears that as the language of the act is disjunctive, the testator is compelled to elect which of the two periods of accumulation he will resort to, for he will not be allowed to avail himself of both; otherwise, under certain circumstances, the combined effect of an express trust for accumulation for twenty-one years, and of the rule of law, which accumulates the income of a minor,

might be the accumulation for upwards of thirty, or even forty years: (*Griffith* v. *Vere*, 9 Ves. 127.)

What trusts for accumulation are void in toto, and what pro tanto only.]—A trust for the purposes of accumulation exceeding the limits allowed for executory devises in general will be void *in toto* (*Leake* v. *Robinson*, 2 Mer. 363, 389); and every trust for accumulation that was void before the statute still remains so (*Boughton* v. *James*, 1 Coll. 26); but a trust for the purpose of accumulation, which merely exceeds the restricted limits prescribed by the above-mentioned act (39 & 40 Geo. 3, c. 98), and not exceeding the limits allowed for accumulation previously to the passing of such act, may be apportioned; so that part of the trust may be sustained, though part is void as to the excess on account of being contrary to the above-mentioned enactment: (*Shaw* v. *Rhodes*, 2 Myl. & Cra. 135; see also 2 Roper Leg. 1559, 4th edit., and the several cases there referred to.)

What persons are entitled to the intermediate income.]—With respect to the persons entitled to the surplus income in cases of devises and bequests of residuary property directed to accumulate beyond the limits prescribed by the above-mentioned act, accruing between the prescribed period and the vesting of the ulterior executory devise or bequest, the rule is, that such intermediate income, including that of the lawful accumulations in the case of real estate, belongs to the heir, and of personalty to the next of kin, in preference to the residuary legatees: (*Elborne* v. *Goode*, 14 Sim. 165.) But in those cases where there is no express direction for accumulation, but the accumulation is left to operation of law, there the intermediate income will devolve upon the persons who ultimately become entitled under the executory devise or bequest: (*Elborne* v. *Goode*, *sup.*; *Corporation of Bridgnorth* v. *Collins*, 11 Jur. 213.)

How trusts for the purposes of accumulation ought to be penned when created out of real estate.]—In framing trusts for accumulation where the property consists entirely of real estate, the usual plan is to limit such property to the use of trustees for the term of twenty-one years, to be computed from the time of the testator's decease, upon the trusts thereinafter mentioned, which are declared to be, that the trustees shall receive the rents and profits, and invest the

same in real or Government securities, with power to vary such securities, and receive the interest, dividends, and annual produce of the said trust moneys, stocks, funds, and securities, and invest the same in like manner, so that they may accumulate in the nature of compound interest, and that the trustees shall stand possessed of the said trust moneys, stocks, funds, and securities upon the trusts thereinafter declared: (see the form 3 Con. Prec., Part VII., No. XLVIII., clause 8, p. 14, 2nd edit.)

Where the accumulations are to be made out of personal property.]—If the accumulated fund is to be created out of personal property, or out of surplus rents and profits, or any other moneys, the trustees ought to be directed to collect and get in the same in the usual manner, and then to invest the accumulated fund in proper securities, with power of varying the same, and also to invest the interest, dividends, and annual produce for the purposes of accumulation at compound interest, but so that no such accumulations should, under any circumstances, be extended beyond the term of twenty-one years, to be computed from the time of the testator's decease.

As to the investment of surplus rents and profits.]—If surplus rents and profits, or any other moneys, are to be invested for the above purpose, the clause is penned in precisely the same manner, merely directing that the same shall be invested with the like power of varying securities, &c.: (see the form 2 Con. Prec., Part VII., No. XXVII., clause 14, p. 792, 2nd edit.)

Where there is a direction as to the application of the rents and profits during minorities.]—Where there is a direction as to the application of the rents and profits during minorities, it will be proper to insert a proviso to confine such application to the minorities of such persons only as may be under the age of twenty-one years at the time of the testator's decease, in order to prevent such trust from falling within the provisions of the above-mentioned statute: (see the form 3 Con. Prec., Part VII., No. XLIX., clause 6, p. 22, 2nd edit.)

5. *For keeping Premises in repair, making Improvements, renewing Leases, effecting Insurances.*

When either freehold, leasehold, or copyhold estates are devised to trustees, and more particularly in those instances

where any of the *cestuis que trusts* are minors, or the trustees are really designed to take an active part in the management of the property, it will be proper to make some provision authorizing them to keep the premises in repair, and to make any necessary improvements therein; and where any portion of the devised property consists of leasehold estate, the trustees should be empowered to obtain the renewal of any leases that may expire, or of which a renewal may be deemed expedient, during the continuance of the trusts; as also to pay the reserved rents and perform the covenants of the lease; and where any of the premises are of copyhold tenure, to pay the rents and perform the necessary suits and services in respect thereof: (see the form 3 Con. Prec., Part VII., No. LI., clause 27, p. 36, 2nd edit.)

As to keeping premises in repair.]—It should be distinctly mentioned what parts of the devised premises are to be kept in repair. If the premises consist of a dwelling-house, it should be stated whether the reparations are to extend to the interior as well as the exterior of the premises, as also out of what funds the expenses are to be defrayed; and if the repairs of the furniture are also to be included, this should be expressly mentioned. It will also be right to say by whom, and in what manner the rates, taxes, and other outgoings in respect of the premises are to be discharged. If the premises, or the furniture are to be insured against damage by fire, a direction to that effect should be inserted: (see the forms of the above kind, 2 Con. Prec., Part VII., No. XXVII., clause 5, p. 786, 2nd edit.; *id. ib.* Vol. III., No. LII., clauses 2, 7, pp. 42, 43.)

Where persons taking limited interests are allowed to occupy mansion-house, and to have the use of the furniture.]—It sometimes happens that a testator directs that his widow, or some other person who takes a limited interest, shall be allowed to occupy his mansion-house, and have the use of the furniture for some specified period; the party to whom such benefit is given keeping the premises and furniture in repair, and insured against damage by fire; and where the premises are of leasehold tenure, paying the rents, and performing the covenants and conditions of the lease, and indemnifying the testator's estate therefrom: (see the form 3 Con. Prec., Part VII., No. LII., clause 10, p. 46, 2nd edit.) To this clause it may prove useful to add a proviso authorizing the trustees, in case of default in any of the above particulars, to make good the same, and deduct the expenses out of any

trust moneys coming into their hands which the defaulting party would be otherwise entitled to receive: (see the form *id. ib.* clause 11, p. 46.)

As to making improvements.]—The clause authorizing trustees to make improvements usually authorizes them to drain, inclose, or otherwise improve any portion of the devised premises in such manner as they deem most advantageous to the improvement of the property; to which is also sometimes added a power to plant trees or other timber on the premises. The latter, however, ought always to be restricted to such portion only of the property as shall be of freehold tenure; for it would be an act of waste in the owners of either copyhold or leasehold estates to cut down or appropriate to their use any timber growing thereon, notwithstanding the whole of such timber may have been planted either by themselves, or by persons through whom they claim the property. To the above clause it will be proper to annex a power for the trustees to arrange with any tenants of the premises what proportions of the expenses of draining, inclosing, or other improvements shall be borne by the latter; and whether in the shape of immediate payments, or of a per centage, or in the nature of an increased rent upon the capital expended upon such improvements; as also (in case timber is to be planted) what allowances shall be made to such tenants in respect of any part of the premises which shall at any time be devoted to the growth of such timber: (see the form 2 Con. Prec., Part VII., No. XXVII., clause 6, pp. 790, 791, 2nd edit.)

Where trustees are to be authorized to lay out money in repairs of property purchased under trusts for investment.]—Where trustees are intended to invest moneys in the purchase of lands, it will oftentimes be advisable to authorize them to lay out money in the repairs and improvements of the purchased property. Whenever, indeed, it is intended they shall have this power, a clause to this effect ought never to be omitted; for it has been determined, that a trust to invest in the purchase of lands does not justify the trustees in laying out moneys in the repairs and improvements of the estate: (*Bostock* v. *Blakeney*, 2 Bro. C. C. 653.)

As to the renewal of leases.]—Where the trustees are to renew leases, they should be authorized to raise money for the purpose, which it is usual to empower them, if necessary, to do by mortgage of the premises. To this is generally

added a power to surrender any subsisting leases for the purpose of effecting such renewals: (see the form 2 Con. Prec., Part VII., No. XXVII., clause 9, p. 791, 2nd edit; *id.* Vol. III., No. LI., clause 27, p. 36.) But in many cases of this kind, it may be advisable to authorize the trustees to use a discretion as to whether or not they shall effect a renewal; for if the trust for renewal is imperative, and the reversioner is aware of the fact, he may possibly attempt to exact higher terms than he would otherwise insist upon, and this, perhaps, to such an extent as may exceed the actual value of the property: (see the form of a proviso of this kind, 2 Con. Prec., Part VII., No. XXVII., clause 10, p. 791, 2nd edit.) It will be proper, also, to declare that any renewed leases shall be held upon the same trusts.

As to payment of rents, performance of covenants, and render of suits and services.]—Where the trustees are to have the actual management of the leasehold property, it will be proper to direct that they shall pay the rents and perform the covenants to be paid and performed in respect of the premises: (see the form 2 Con. Prec., Part VII., No. XXVII., clause 8, p. 790, 2nd edit.) And in the case of copyhold estates, to direct that they shall pay and perform all rents, heriots, duties, suits, and services to be paid, rendered, and performed for or in respect of the copyhold premises: (*id. ib.* clause 7, p. 790.)

Where trustees are to be admitted to copyhold premises.]—Where trustees are to be admitted to copyholds, or any other expenses are to be incurred by them in the execution of the trusts of the copyhold premises, it will be proper to authorize them, out of the rents or profits thereof, or by such other means as they may deem proper, to levy and raise such sums of money as may be necessary to defray all the expenses above referred to, or as they may incur in the execution of any of the trusts relating to the premises: (see the form 2 Con. Prec., Part VII., No. XXVII., clause 9, pp. 790, 791, 2nd edit.)

6. *Trusts and Directions for the carrying on of a Trade or Business.*

Whenever it is intended that a testator's trade or business is to continue to be carried on for the benefit of his family, or any other person or persons, or for any other purpose whatever, the will should always contain an express authority

for that purpose, otherwise neither his trustees or executors will be justified in so doing, however advantageous such a course of proceeding may appear. It will be necessary, also, at the same time, to confer ample authority upon the trustees to compound all debts, and so arrange the conduct of the business, that they may be released from all responsibility with respect to any losses incurred by giving credit or time for payment, or taking insufficient securities from debtors, paying debts in the absence of any strict legal proof of their having been contracted, or any other damage resulting from any act which a person having the absolute control of a business may incur in the conduct of it, or for any loss whatever, unless the same is occasioned by the actual misconduct of the trustees. They should also be empowered to increase, diminish, or discontinue the business altogether, if likely to prove a losing concern; for if the business is directed to be carried on, at all events, until some stated period arrives, considerable, and even ruinous losses might be thereby incurred, from the fluctuating and uncertain nature of nearly every kind of business which, however lucrative at one time, may at another, from a variety of unforeseen circumstances, fall off, and become altogether unprofitable: (see the form adapted to all the above-mentioned circumstances, 2 Con. Prec., Part VII., No. IX., clauses 6, 10, and 12, pp. 668, 670, 2nd edit.)

Nature of trade, place where it is to be carried on, by whom to be conducted, and for how long a time, should be expressly stated.]—The nature of the trade or business, the place where it is designed to be carried on, and by what persons, and for how long a time it is to be continued, should be clearly set out in the directions: (see the form 2 Con. Prec., Part VII., No. IX., clauses 5 to 8 inclusive, pp. 668, 669, 2nd edit.) And if, at the expiration of the period, any other persons are to be admitted into the business, the terms upon which such admission is to be made should be distinctly specified: (see the form *id. ib.* clauses 15, 16, pp. 671, 672.)

When the business is to be carried on under the superintendence of the testator's widow.]—If the business is to be carried on under the superintendence of the testator's widow, he ought, for the reasons we have previously suggested (*ante*, p. 725), to be asked whether he intends her control over the business to cease or to continue in the event of her future marriage: (see the form of a restriction of this kind,

2 Con. Prec., Part VII., No. IX., clause 5, p. 666, 2nd edit.) And if it is to cease, how the concern is to be afterwards conducted: (*id. ib.* clause 17, p. 672.) The manner in which the profits are to be divided should also be set out, as also the manner in which they are to be applied and disposed of.

Where any of the testator's sons are to become entitled to carry on the business.]—If any of the sons are to be entitled to undertake the management of the business upon attaining a certain age, or at some other specified period, it should be so stated; as also the terms upon which such son is to be admitted into the business (*id. ib.* clauses 15 and 16, pp. 671, 672, 2nd edit.); and it will also be proper to provide whether, and in what way, in case of any son declining, any of the other sons are to have the option of entering into the business (*id. ib.* clause 17, p. 672); as also how the concern is to be disposed of, in case all the sons should decline to enter into it; and if any of the sons are to be employed in the business during the interval, it should be so stated in the will: (*id. ib.* clause 11, p. 670.)

Propriety of inserting clause directing insurance of stock and premises.]—It may also be prudent to insert a clause directing the trustees to insure the stock against loss or damage by fire: (*id. ib.* clause 19, p. 673.)

Where the business to be carried on consists of a farm.]—Where the business to be carried on consists of a farm, the best plan seems to be to bequeath all the farming stock to the trustees that are to have the management of the concern, who should have ample authority conferred upon them to cultivate the lands in such manner as they may deem most advantageous; to sell and dispose of the stock and produce of the farm; and to purchase cattle and farming implements necessary for the purposes of the business. A power should also be conferred upon the trustees to increase or diminish the stock, employ servants, labourers, &c., and engage and discharge the same, and generally to conduct the business in such manner as they may consider best for the benefit of the concern. The manner in which the profits are to be applied should also be set out; and it should also be stated how the farming stock and business is to be disposed of when the time appointed for the trustees to conduct the same shall have expired: (see the form 2 Con. Prec., Part VII., No. XI., clauses 3 to 8 inclusive, pp. 683, 685, 2nd edit.)

7. Trusts for raising Funds for securing Anuuities.

Where annuities are bequeathed by will they are either charged upon the whole, or upon some portion of the testator's testamentary property: (see the form of a charge on both the real and personal estate, 2 Con. Prec., Part VII., No. XVII., clause 5, p. 717, 2nd edit.) When they are charged on both the real and personal estate, it will be better to state whether the real estate is to be the primary fund, or only to be charged in aid of the personal estate; and even where the real estate is to be solely charged, it will oftentimes be advisable to restrict the charge to some portion only of the property, instead of making it a burden upon the entire real estate. This precaution is most essential where there is a probability that any of the real estates may be required to be sold, in which case care should be taken that this part of the property is unaffected by the charge; because, as an annuity or rentcharge charged upon lands issues out of every part of it, the smallest portion of it cannot be sold discharged of the incumbrance, without the annuitant's concurrence; and if the annuitant concurs in releasing the annuity from any part of the lands, it will operate as an extinguishment of the whole charge, so that a re-grant of it will be necessary to reinvest the annuity again in the annuitant. Added to this, an annuitant cannot be compelled to release his interest for any consideration or compensation that can be offered him; and therefore, without his concurrence, no purchaser could be compelled to complete his contract, unless he entered into an express agreement to buy the property burdened with the charge: (*Page* v. *Adam*, 10 Law Journ. N. S. 407.) For this reason, particularly where small life annuities only are intended to be charged on the property, and the testator's sole object is that sufficient funds should be provided for their payment, it will be advisable to empower his trustees to set apart and appropriate a particular fund for the purpose (see the form 2 Con. Prec., Part VII., No. XVII., clause A. *in notis*, p. 718, 2nd edit.); added to which, it may sometimes be advisable to give them a discretion to purchase such annuities either from the Government, or some public companies (*id. ib.*), and thus enable them to clear off incumbrances from the estate they would otherwise be unable to get rid of.

Cases in which a particular fund is commonly directed.]— Where a particular fund, adequate to the purpose and no

more, is generally directed to be set apart in preference to making the charge upon the whole estate, is, where a payment is to be made to some particular object by way of maintenance, by weekly or monthly instalments. In cases of this description, the will usually directs that the trustees shall set apart and apply so much of the testator's testamentary estate as will produce some specified annual sum, and thereout make certain weekly or monthly payments for the maintenance and support of the object of the testator's bounty. Provisions of this kind are not unfrequently made by testators in favour of some members of their family, or other persons for whom they are desirous to provide a maintenance, but whose extravagance or incapacity renders them unfit to have the uncontrolled management of their property. Under these circumstances it is often advisable to restrict them from alienating or anticipating the growing payments of their allowance. To accomplish this effectually, the best way seems to be to direct that the payment of the allowance shall cease upon the party to whom it is payable alienating the same, or doing any act whereby such allowance, if permitted to exist, would become vested in any other person: (see the form 2 Con. Prec., Part VII., No. XVIII., pp. 720, 721, 2nd edit.)

8. *Trusts for the separate use of Married Women.*

Trusts for the separate use of married women are penned in the same terms in a will as in a deed, with this simple difference, that in the case of a will the limitations should be made in a more concise form than in the latter instrument. If the trust is of real estate, and it is designed to give the married woman the most absolute power of disposition over the property, as well as to restrict the husband from all control over it, the proper course will be to vest the legal fee in trustees during the life of the wife, upon trust for such persons as she shall by deed or will, or any writing purporting to be a will, and notwithstanding her coverture, appoint, and in default of such appointment, upon trust for her sole and separate use, free from the control, debts, or engagements of her present or any after taken husband.

As to personal estate.]—In the case of personal estate, it will not be necessary to give a married woman an express power of disposition in order to confer that authority upon her, where the property is limited to her separate use; for

if limited to her in those terms, she may dispose of it as a feme sole to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose (*Fettyplace* v. *Gorges*, 1 Ves. 46; *Rich* v. *Cockell*, 9 Ves. 636; *Sturgis* v. *Corp*, 13 Ves. 190; *Headen* v. *Rosher*, 1 M'Clell. & Yo. 89); but it is otherwise where real estate is limited to a married woman for her sole and separate use, without expressing more; for this will give her no further power of alienation over it than she would otherwise possess, and this she can now only effect with her husband's concurrence, and her acknowledgment of the deed of conveyance in due form of law, according to the provisions of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), previously to which a fine or recovery would have been necessary to accomplish the same purpose.

Where alienation is to be restricted.]—If the power of alienation is to be restricted, it will then be proper to add to the limitation to the separate use that it shall be without power of anticipating the growing payments; still, this restriction will only be operative during the coverture; and whenever she takes an absolute interest in the property, her power of alienation whilst sole cannot be restrained by any proviso or condition whatever (*Bradley* v. *Piexito*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & Walk. 154; *Barton* v. *Briscoe*, Jac. 303; *Jones* v. *Salter*, 2 Russ. & Myl. 208; *Woodmeston* v. *Walker*, *ib.* 197); but where she takes a mere life interest, her power of disposition may be restrained by a condition for cesser of her estate by alienation, either by her own act, or by operation of law: (see the form 2 Con. Prec., Part VII., No. XL., clause 3, p. 850, 2nd edit.)

As to limitations to the separate use of daughters.]—In the case of bequests to children, it is sometimes designed that the shares of daughters shall be for their separate use, in which case it will be proper, after the usual declaration of the trust as to the time of the vesting of the shares, to go on and add, that, with respect to the share of such of the children as shall be daughters, the limitation shall be for their sole and separate use, free from the control of any husband or husbands; and if they are to be deprived of the power of anticipation, it should be so stated: (see the form 2 Con. Prec., Part VII., No. XII., clause 3, p. 690, 2nd edit.) It sometimes happens that the vesting of the shares of daughters is made to depend upon their marrying with consent, and in cases of this kind, it is

also provided that in case any of the daughters shall marry without such consent, the trustees are to stand possessed of the shares to which they would have been entitled to on observance of the condition, upon trust for their separate use: (see the form *id. ib.* No. XX., clauses 9, 11, 12 and 13, pp. 732, 734, 2nd edit.)

9. *Trusts for Wife and Children.*

The most common form of trust for a testator's wife and children, is to direct his trustees to pay either the whole, or some portion of the income of the trust fund to his widow during her widowhood; and after her decease or future marriage, to divide the principal amongst the children, to become vested interests in such of them as shall be sons at the age of twenty-one years, and in such of them as are daughters on their attaining that age or marriage; with provisions for maintenance before their shares shall become vested interests, to which are usually added a power to advance some part, and sometimes even the whole of the presumptive shares towards their placing out or advancement in the world.

As to provision for widow.]—Where a testator makes a provision for his widow, he generally makes it determinable with her widowhood; but sometimes, instead of depriving her of the whole, he substitutes a smaller gift (see a form of this kind, 2 Con. Prec., Part VII., No. XII., clause A. *in notis*, p. 689), and sometimes, but very rarely, the provision is unfettered altogether by any restriction as to future marriage.

Bequest to widow, with direction that she shall thereout maintain his children creates a trust in favour of the latter.]—In provisions for wife and children, it is sometimes directed that the trustees shall pay the income of the trust fund to the widow, she thereout maintaining his children; and whenever this occurs, it will create a trust in favour of the children, and she will be obliged to apply the funds accordingly: (see the form 2 Con. Prec., Part VII., No. 6, clause 17, p. 657, 2nd edit.)

As to the time of vesting of children's shares.]—The shares of the children may be made vested interests either at the testator's decease, or at some future period; but where there is any probability that many of the children may be minors at that period, the general practice has been to make the

vesting of the shares as to sons depend upon their attaining the age of twenty-one years, and as to daughters on their attaining that age or marriage; which possesses this advantage, that as the will embraces such objects only as answer the required description, no substituted gifts will be necessary in case any one or more of the children should die before acquiring a vested interest, but whose presumptive share or shares would then become distributable amongst the survivors under the original gift; whereas, if the children took vested interests at the testator's decease, provisions for survivorship and accruer would require to be inserted, in order to let in any of the survivors in case any one or more of the children should die before the fund becomes payable, which provisions it will be necessary to extend not only to the original, but also to the surviving or accruing shares, for in the absence of express words to denote the intention, the original shares only, and not those which have accrued, will pass over to the survivors: (see the forms 2 Con. Prec., Part VII., No. IX., clauses 25 and 27, p. 675, 2nd edit.)

As to provisions for maintenance.]—It is generally intended that before the vesting of the shares some provision should be made for the maintenance of the children in the interim, and whenever it is so intended, a clause to that effect must never be omitted; for in the absence of an express authority from the testator, neither his trustees or executors have any power to apply any part of the income of the presumptive shares for that purpose. It should also be stated how much is to be so applied, and what is to become of the overplus, although the best plan seems to be to direct that the trustees shall apply it in augmentation of the child's share out of which it arises, but at the same time empowering the trustees to apply such overplus towards his maintenance in case they may think proper so to do: (*Lewis* v. *Lewis*, 17 L. J. 425, Ch.; see the form 2 Con. Prec., Part VII., No. VI., clause 20, p. 658, 2nd edit.)

Where the provision is for the maintenance of the children not belonging to the testator.]—Where the provision is for the maintenance of children not belonging to the testator, it should be ascertained whether it is his intention that the trustees should apply the trust funds for this purpose, if the parents of the children have the means of providing them with a suitable maintenance without this assistance, and to pen the will accordingly; otherwise, it seems, if the parents

possess the means, the trustees would not be justified in applying any portion of the income of the presumptive shares for that purpose; the will ought also to state into whose hands or in what manner the funds for maintenance are to be paid or applied. Sometimes the provision for maintenance is made to depend upon the happening of some contingent event; as, for example, the death of the father of the children, who is in the receipt of a life income that affords sufficient means of supporting them, and during whose lifetime no such provision is to be made: (see a form of this kind, 2 Con. Prec., Part VII., No. XI., clause 14, p. 686, 2nd edit.)

Power of advancement.]—In making provisions for children, it should always be ascertained from the testator whether there shall be a power to advance either the whole or any portion of the presumptive share of any child towards his or her placing out or advancement in the world, as also how much of the share is to be so applied, and also in whom such power of advancement is to be vested. Sometimes the provisions for maintenance and power of advancement are blended together in the same clause, and both conferred upon the same person: (see a form of this kind, 2 Con. Prec., Part VII., No. VII., clause 4, p. 664, 2nd edit.; as to usual forms of powers of advancement, see *id. ib.* No. XI., clause 15, p. 687; *id. ib.* No. XII., clause 9, p. 692.)

Hotchpot clause.]—Where a power of appointment may be exercised in favour of children or any other class of persons, the testator should be asked whether it is his intention that in case the power should be exercised in favour of any of the objects, it is to affect their shares in the unappointed portions of the trust fund, and whether or not they are to be entitled to the benefit of the same, without bringing their appointed shares into hotchpot, and accounting for the same accordingly, and having ascertained what his intention is in this respect, the will should be penned in accordance therewith: (see the form of hotchpot clause, 2 Con. Prec., Part VII., clause 13, p. 686, 2nd edit.)

Where issue of children are to be substituted in the place of their deceased parents.]—If the issue of any children who shall happen to die in the testator's lifetime, or without having acquired a vested interest under the will, are to be substituted in the place of their deceased parent, an express clause to that effect will be necessary, in which it should

state the time at which the shares of such issue are to become vested interests, as also whether they are to take *per stirpes* or *per capita*; and where provisions for maintenance and advancement have been limited in favour of the deceased parent, it will be proper, also, to extend them to the issue who are to be substituted in such parent's stead: (see the form 2 Con. Prec., Part VII., No. VI., clause 19, p. 658, 2nd edit.; *id. ib.* No. XXX., clause 9, p. 810.)

When advancements made by a parent, or one standing in loco parentis, in favour of children, are not to operate as a satisfaction of legacies bequeathed to them by their parent's will, an express clause to that effect should be inserted.]—Whenever it is intended that legacies bequeathed by a parent, or a person standing *in loco parentis*, to children, shall not be adeemed by any advancement the testator may make to them in his lifetime, an express clause to that effect will become requisite (see the form 2 Con. Prec., Part VII., No. XXX., clause 12, p. 811, 2nd edit); for an advancement made by a parent, or a person standing *in loco parentis*, either on the marriage, or subsequent to marriage, or by way of advancement of a legitimate child, will be treated as a satisfaction or ademption of a legacy or portion moving from the same person: (*Davey* v. *Boucher*, 3 You. & Coll. 397; see also *Moncke* v. *Moncke*, 1 Ball. & B. 298.) But this rule only applies to portions or legacies given by a father, or a person standing *in loco parentis*; hence a legacy bequeathed by a stranger (*Shudall* v. *Jekyll*, 2 Atk. 516), or by a putative father (*Smith* v. *Strong*, 4 Bro. C. C. 494), or by an uncle, or even by a grandfather during the father's lifetime (*Brown* v. *Peck*, 1 Eden, 140), will not be adeemed by an advancement made by either of such persons to the legatee, neither of whom are considered as standing *in loco parentis* to him. And even an advancement by a father, or any person standing *in loco parentis*, will not operate as a satisfaction, unless it be equally advantageous and certain to the person to whom such advancement has been made, as the legacy or portion it is to adeem and be substituted in the place of; consequently, money secured to be paid upon the happening of some contingent event, will not be allowed to operate as a satisfaction of an absolute bequest (*Clarke* v. *Seawell*, 3 Atk. 38); so neither will the bequest of a residue, from the uncertainty of the amount: (*Farnham* v. *Phillips*, 2 Atk. 214; *Freemantle* v. *Banks*, 5 Ves. 97.) The advancement must also be of the same nature as the bequest; consequently, a bequest of money is not satisfied by the gift of

an annuity (*Crompton* v. *Sale*, 2 P. Wms. 555), or by the bequest of a beneficial lease (*Greaves* v. *Salisbury*, 1 Bro. C. C. 425), such gifts being in their nature distinct from a bequest of money. It is also necessary that the advancement should come from the same person; hence a sum of money directed to be raised by an executor under a power and advanced to a child, will be no satisfaction, because the portions come from two distinct persons: (*Crompton* v. *Sale*, *supra*.) And it is equally essential that the advancement should be made to the same identical person to whom the legacy or portion is bequeathed; therefore an advancement to the husband, who gave a receipt for the sum advanced as part of his wife's portion, was holden to be no satisfaction of a legacy that was limited differently by the will of the party making the advancement: (*Bell* v. *Coleman*, 5 Mad. 23.)

II. Powers.

1. To make jointures.
2. To raise portions for younger children.
3. For females to appoint life estates or create charges in favour of their husbands.
4. To grant leases.
5. To enfranchise copyholders.
6. Of sale, partition, and exchange.
7. To cut down timber.
8. To appoint bailiffs, agents, and receivers.

Various kinds of powers usually contained in wills of real estate.]—The usual powers contained in wills, whereby real estate is devised in strict settlement, that are conferred upon persons taking beneficially under it, are to make jointures, raise portions for younger children, to grant leases, to cut down timber; and in the case of females, to appoint life estates, or some other beneficial interests in favour of their husbands and children, or other issue. The powers usually conferred upon trustees are to sell or exchange, or effect a partition or exchange of the settled property, to invest moneys in the purchase of lands, to cut down timber, and to appoint agents, bailiffs, and receivers.

1. *Power to make Jointures.*

The power to make jointures usually authorizes the party upon whom such power is conferred, either before or after he shall be in the actual possession, or in receipt of the rents and profits of the settled property (but without prejudice to

any uses antecedent to his estate in the premises), either by deed or by will, to limit any annual sum (not exceeding some certain specified amount), by way of jointure upon any woman he may marry, with the usual powers of distress and entry for securing the due payment thereof; and also to limit the settled property for any term of years as a further security for such payment: (see the form 2 Con. Prec., Part VII., No. XLI., clauses 1 & 2, p. 863, 2nd edit.)

2. To raise Portions for Younger Children.

Powers for raising portions for younger children usually authorize one or other of the parents, and sometimes both of them, or the survivor, taking a life estate or other limited interest under a settlement, by deed or instrument in writing or by will, and in case of a female, whether she be covert or sole, to create a term of years for the purpose of raising money for the portions of younger children. The power should set out how the money is to be raised, as by sale, or mortgage, or out of the rents and profits, or by all, any, or either of these means. A power of this kind is generally intended to include all the children, excepting the one who takes an estate in the property, and would therefore include a daughter, although the eldest child, whose brother, born subsequently to her, in the character of the eldest son succeeds to the property. The terms most commonly employed to describe the objects of the power are, "all or any the child or children of the person for the time being exercising this present power (other than or not being an eldest or only son for the time being entitled under the limitations hereinbefore contained to the said hereditaments and premises for an estate for life, or in tail male, or in tail in possession or remainder, expectant on the decease of his parent.) The amount of the portions to be raised should also be mentioned, as also the rate of interest they are to bear from the time they are vested until they become actually payable. The amount to be raised is generally regulated by the number of children who are to participate in the fund. It is also the usual practice to authorize the person exercising the power to fix the age and time at which such portions are to vest, and at the same time to state the precise extent to which the power of directing and apportioning the shares is to be limited, and the nature of the instrument by which such power is to be exercised; as by deed or instrument in writing, or by will, or by all or either of such instruments: (see the form 2 Con. Prec., Part VII., No. XLI., clause 3, pp. 663, 664, 2nd edit.) If, as is gene-

rally the case, it is intended that no portions shall be raised until the term shall take effect in possession, an express proviso to that effect ought to be inserted (see the form *id. ib.* clause 4, p. 664); otherwise, as a general rule, where portions secured by a term of years are made payable at a particular time, or on the happening of a particular event, as at twenty-one, or marriage, and the contingencies have happened, and there is nothing in the instrument to indicate a contrary intention, the portions must be raised by an immediate sale or mortgage of the term, although it may be reversionary: (*Codrington* v. *Foley*, 6 Ves. 380.) But where there is an express direction, or in fact any expressions tantamount to a direction that the portions shall be raised only when the term takes effect in possession, such an expression of the intention will prevail; hence, where the trust was to raise the portions *from and after the commencement* of the term, it was held sufficient for the purpose: (*Butler* v. *Duncombe*, 1 P. Wms. 448.)

Proviso for cesser of term.]—It is also usual to insert a proviso for cesser of the term when all the trusts of it shall have been performed (see the form 2 Con. Prec., Part VII., No. XLI., clause 5, p. 864); but this is now a mere formal clause, as all terms are now made to cease as soon as the purposes for which they are created are satisfied: (stat. 8 & 9 Vict. c. 112.)

As to limit which portions are not to exceed.]—It is also a common practice to add a further proviso that the premises are not at any one time to be charged beyond some certain specified sum; and therefore, if any subsequent charges would increase the whole sum charged to more than the sum mentioned, the subsequent charges shall wholly or partially fail of effect until the previous charges shall cease or be reduced: (*id. ib.* clause 6, p. 865.)

Where the portions are not to be raised in the lifetime of the parents.]—In penning trusts for raising portions, if it is intended, as it almost universally is, that the portions are not to be raised in the lifetime of the parents, it will be proper to specify this intent (*Hall* v. *Carter*, 2 Atk. 356); but it has been held that this will not be necessary in the case of a power where the parents have a general authority to appoint the portions amongst the children by deed or will in such portions and manner, and at such time, as they may choose; because a limitation of this kind will be considered

plain evidence of an intention that the money should not be raised in the lifetime of the parents: (*Winter* v. *Bold*, 1 Sim. & Stu. 507.)

Trusts for raising portions for children not within the Thellusson Act.]—It must be remembered that a trust for raising portions for children is expressly exempted from the operation of the Thellusson Act (39 & 40 Geo. 3, c. 98), by which the accumulation of the income of property is restrained within certain limits in the manner we have already pointed out: (see *ante*, p. 873.)

3. *For females to appoint life estates or create charges in favour of their husbands, or interests in favour of their children or other issue.*

As to real estate.]—Where females are authorized to appoint any estates or interests arising out of, or charged upon, real estate in favour of their husbands, the power authorizes either the appointing an actual estate; as an estate for life, or an annual sum in the nature of a rent-charge issuing out of, and chargeable upon, the settled property. This power she is generally authorized to exercise either by deed, or by will, and whether she shall be covert or sole. Where the appointment is to be by way of rentcharge, the clause is penned in much the same terms as in the instance of a power of jointuring limited to a husband, authorizing in like manner powers of distress and entry, and also the creation of a term of years as a further security; to which is commonly added a proviso that no appointment shall take effect unless the person making the same shall herself become entitled to the actual possession of the premises to be charged with such payment, or beneficially entitled to the rents and profits thereof: (see the form 2 Con. Prec., Part VII., No. XLI., clauses 7 and 8, pp. 865, 866, 2nd edit.)

As to personal property.]—Where the power relates to trust moneys, or any other kind of personal estate, it may be limited to be exercised either by deed, or by will, and whether the donee of the power shall be covert or sole, and subject to such restrictions as she may think proper: (see the form 2 Con. Prec., Part VII., No. XII., clause 10, p. 692, 2nd edit.)

4. *To grant Leases.*

Tenants for life under a settled estate could not, in the

absence of a power of leasing, have granted leases for a longer period than their own lives: but tenants in tail were (by statute 32 Hen. 8, c. 28) empowered to grant leases for the term of three lives or twenty-one years; still, such last-mentioned leases, although binding on the issue in tail, were inoperative against those in remainder or reversion. In order also that these leases may be valid, the terms of the statute must be strictly complied with. These terms require that the lease shall be made by indenture; that it shall begin presently and not *in futuro;* and that it shall be either for three lives or twenty-one years, but not for both: yet it may be for any shorter period than either the three lives or the twenty-one years, and would therefore be good if made for two lives, or even one; or for fifteen, ten or any lesser number of years than those prescribed by the statute: (*Isherwood* v. *Oldknow*, 3 Man. & Selw. 382.) With respect also to husbands seised of lands in right of their wives, the same statute (32 Hen. 8, c. 28) enacts, "that husbands seised in right of their wives, whether in fee, or in tail, or jointly with their wives, of any estate of inheritance made before marriage, shall be empowered to grant leases; provided the wife be made a party to every such lease, that such be made by indenture, and that she seal the same, and that the rent be reserved to the husband and wife, and the heirs of the wife, according to her inheritance. The proviso requiring the wife to be a party, it must be observed, extends only to those cases where she is solely seised of the inheritance; consequently, where she and her husband are jointly seised, she need not be made a party: (Butler, Co. Litt. 44, a. n.)

Important alterations in the law effected by recent enactments.]—The recent statute 19 & 20 Vict. c. 120, for facilitating the leases and sales of settled estates, has introduced some very important alteration in the law in this respect, by empowering the Court of Chancery to authorize leases of any settled estates, on condition that such leases are to take effect in possession within a year, and be for a term not exceeding twenty-one years for an agricultural lease, and ninety-nine years for a building lease, for the best rent that can reasonably be obtained, to be made payable half-yearly, without taking any fine, to be granted by deed, the lessee executing a counterpart of it, and containing a condition for re-entry for non-payment of the rent within twenty-eight days after it becomes due. But such leases are not to authorize the felling of timber, except so much as is necessary for building, or works authorized by the lease. Such

leases may contain special covenants approved by the court. They may also be surrendered and renewed.

The terms on which such leases are to be granted, whether for agricultural, or for building purposes, are very similar to those usually inserted in leasing powers conferred upon tenants for life or in tail in settlements of real estate, whether created by deed or by will: (see the forms 2 Con. Prec., Part VII., No. XLI., clause 9, p. 866, 2nd edit.; *id. ib.* clause 10, p. 867.) Therefore, in penning clauses of this kind, the terms required by the above statute would prove a very good guide to go by.

As to the persons upon whom the statute confers the power of leasing.]—With respect to the persons on whom the power of leasing is conferred by this statute, a tenant for life, or for a term determinable on their lives, or for any greater estate, either in their own right, or in right of their wives, are empowered to grant leases for twenty-one years, unless the settlement shall contain an express prohibition; and this, without any application to the court; provided only, that it be for a rack rent, without fine or forfeit, and the rent incident to the immediate reversion; the demise to be with impeachment of waste, and to contain a covenant for payment of rents, and other proper and usual covenants, with a condition of re-entry for nonpayment of rents, and nonobservance or nonperformance of the covenants, and a counterpart executed by the lessee, and all leases, &c., prepared and executed are valid against the person executing it, and all other persons entitled to subsequent estates by the same settlement. This act repeals the statute 32 Hen. 8, c. 28, and 10 Car. 1, Sess. 3, c. 6 (Ireland), so far as relates to leases granted by tenants in tail, or husbands seised in right of their wives. The act came into operation on the 1st of November, 1856.

Practical observations.]—Notwithstanding the authorities conferred by this act, it will be advisable in every case where powers of leasing are to be granted to persons taking under the limitations of a settlement, whether by deed or by will, to point out the extent and requisitions under which such power is to be exercised, as also what persons are to be entitled to exercise it, in the same manner as if the act had never been passed. The act certainly confers some important privileges, but these are not enough to dispense with the preexisting practice with respect to penning clauses of this nature. It must also be observed,

that the above enactment does not extend to authorize the granting of leases of copyholds not warranted by the custom of the manor; neither does it relate to granting leases of mines, or mining setts, or to powers for granting leases for lives, or years determinable upon lives.

As to leases of mines, mining setts, &c.]—Where powers to grant leases of mines or mining setts are to be confer- the power should be sufficiently ample to authorize the donee to grant such leases or setts as may enable the lessee or grantees to work the mines in a proper and effectual manner, and upon such terms, and subject to the same covenants and restrictions as are usually contained in such leases or setts in the surrounding country and neighbourhood.

Where the power is to grant leases for lives, or for years determinable upon lives.]—If a power is to be given to grant leases for lives, or for years determinable on lives, the power should be extended to such premises as have been usually let or demised on leases for lives, or leases for years determinable on lives. The number of lives for which the leasee is to be held should be stated, as also the terms upon which the lease is to be granted, in which it is usually provided that the lessees shall execute a counterpart of the lease, which shall contain a covenant on the part of the lessees for payment of the rents, and observance and performance of the covenants, duties, suits, and services, and also that the lease shall contain a proviso for re-entry for nonpayment of the rent, and that the lessee shall not be made dispunishable for waste: (see the form 2 Con. Prec., Part VII., No. XLI., clauses 9 & 10, p. 868, *in notis*, 2nd edit.)

Where the power is to renew leases for lives of copyholds.]—If the power is to grant the renewal of leases of copyhold estates, the power usually authorizes the donee to grant or fill up any leases for lives, or years determinable on lives, or years absolute, of any tenements holden by copy of court roll of any manor devised by the will, as at the time of the testator's decease, or at the time of the same becoming subject to the uses of the will, may be out and subsisting, to be holden according to the custom of the manor; but so, nevertheless, that the old and accustomed rents, heriots, and services be duly reserved in such renewed leases: (see the form 2 Con. Prec., Part. VII., p. 868, *in notis*, 2nd edit.)

5. *To enfranchise Copyholders.*

Where a power is to be given to enfranchise copyholds, the party to whom such power is limited is authorized to make any enfranchisement of any copyhold or customary tenements holden by copy of court roll, of any manor or manors therein mentioned or devised, and to enter into all such contracts and conveyances as may be deemed necessary or expedient to enable the persons entitled to such copyhold or customary tenements and premises to hold the same as and for an estate of freehold tenure, freed from all customary rents, fines, services, and customs, and freed from the uses, trusts, powers, and provisoes contained in the settlement.

6. *Of Sale, Partition, and Exchange.*

Where powers of sale or exchange are to be inserted, it should be mentioned whether or not the lands to be purchased or exchanged are lands of the same tenure as those sold or to be given in exchange; or whether lands of any other kind of tenure are to be so taken; as also whether any sums of money are to be allowed to be received by way of equality of exchange or partition. If Irish property is not to be received in exchange, it should be so stated. If the consent of any persons are to be obtained before such powers are to be exercised, they should be expressly named, and at the same time it should be stated that such powers are to be exercised with their consent: (see the form 2 Con. Prec., Part VII., No. XLI., clause 12, p. 869, 2nd edit.)

To revoke uses.]—A clause should also be annexed to revoke the uses, and by the same deed or other instrument of revocation, or any other deed or instrument, to declare such new uses as may be expedient for the purpose of carrying out the object of the powers: (see the form 2 Con. Prec., Part VII., No. XLI., clause 13, p. 169, 2nd edit.)

When it will be essential to create an express power to make partition.]—Where any portion of the settled property consists of an undivided estate, a power to make partition, as well as to effect a sale or exchange, should always be inserted, as it appears, to say the least of it, to be a doubtful point whether a clause containing the usual powers of sale and exchange will authorize a partition: (*Bradshaw* v. *Fane*, 27 L. T. Rep. 25.)

As to the application of the purchase moneys, or moneys to

be given for equality of sale or partition.]—The trustees should be directed to invest the moneys to arise from the sale, or given by way of equality of partition, in other lands; and it should be declared that such lands, as also any such lands as shall be taken in exchange, or apportioned by way of partition, shall be limited to the previous uses: (see the form 2 Con. Prec., Part VII., No. XLI., clauses 15 and 16, pp. 870, 871, 2nd edit.)

Where copyholds or leaseholds are to be purchased or taken in exchange.]—Where copyholds or leasehold estates are authorized to be purchased, or taken in exchang, the direction ought to be that they are to be settled to the same uses, or as near thereto as the different tenures and qualities of the respective estates will permit. Where the power authorizes leasehold estates to be included in the settlement, it may be proper to provide that any leasehold estates shall be subject to the payment of all fines, and all other incidental expenses incurred on each renewal of every lease thereof, which it ought to be directed to be paid out of the rents and profits of the same premises: (see the form 2 Con. Prec., Part VII., No. XLI., note (*e*), p. 871, 2nd edit.)

Moneys arising from sale, or given by way of equality of exchange or partition, should be directed to be invested until an eligible purchase can be found.]—It will be proper, also, to add a clause directing that, until an eligible purchase can be found, the trustees are to invest the moneys, with usual powers of varying securities, and that the interest and dividends arising therefrom shall be paid to the person or persons for the time being who would be entitled to the rents and profits of the purchased lands: (see the form 2 Con. Prec., Part VII., No. XLI., clause 17, p. 872, 2nd edit.) When a power of partition is authorized to be made with the consent of some particular persons, it ought to be ascertained from the testator if he intends that this restriction is to continue during the minority of any such persons whose consent is so required. If it is not so intended, it will be necessary to add a clause expressly authorizing the trustees, at their own discretion, to make such partition during the minority of any persons whose consent would otherwise be required, but who, on account of their nonage, are incompetent to give the same: (see the form 2 Con. Prec. ,Part VII., No. XLI., clause 19, p. 873.)

As to powers of sale for the purpose of discharging incum-

brances.]—As powers of sale for the purpose of discharging incumbrances are usually penned, the trustees are authorized to sell such portion of the devised lands as may be required for the purpose, and to enter into such contracts or conveyances as may be required for perfecting the sale; with usual power of giving receipts and indemnity to purchasers, and also to revoke the old and declare new uses in the manner we have just before pointed out: (see the form 2 Con. Prec. Part VII., No. XLI., clauses 20 and 21, pp. 873, 874, 2nd edit.)

7. *To cut down Timber.*

Where a power is conferred upon tenants for life, or any other persons who take limited interests in the devised premises, to cut down timber, it is very common to provide that the value of the timber, including the bark, to be cut down in any one year is not to exceed some certain specified value; and that no ornamental timber is on any account to be so felled; and that any excess in cutting down, or any felling of ornamental timber shall be accounted as waste, and be punishable accordingly: (see the form 2 Con. Prec., Part VII., No. XLI., clauses 22 and 23, pp. 874, 875, 2nd edit.) If it is intended that the timber is only to be felled with the consent of the trustees, it will be requisite, in order to carry out that object, to insert an express clause to that effect: (see the form *id. ib.*, note (*f*), p. 874.)

Power to cut down timber for the purpose of repairs.]—Where the power of cutting down timber is to be restricted to the purpose of building or repairing the settled premises, the power should be expressly restricted to those purposes; but to this it will often prove advantageous to authorize the persons cutting down such timber to sell such timber as may not be properly adapted to such buildings or reparations, and to purchase timber better suited to those purposes out of the proceeds of such sale; by which means a considerable saving may not only often be effected, but the property itself put in a better state of reparation than if no other timber but that growing upon the estate was used for the purpose: (see the form 2 Con. Prec., Part VII., No. XLI., clause 25, p. 876.) To this clause it will be proper to add, that if the timber so felled, or the money arising from the sale of any such timber shall be misapplied, such misapplication shall be accounted as waste; but with a proviso that no purchaser of the timber shall be in anywise prejudiced

thereby, or be bound to see to the application of the purchase moneys: (*id. ib.*)

Power to cut down timber during minorities.]—Where a power is conferred upon trustees to cut down timber during the minority of any persons beneficially entitled to the devised premises, it is by no means unfrequent to extend this power to the cutting down pollards, coppices, and underwoods, provided they be in a sufficient state of maturity, or in a state of decay, and to direct that the proceeds of the sale shall be applied in discharge of incumbrances, and the residue (if any) invested in the purchase of other lands, to be settled to the same uses as the devised premises, and that in the meantime, until an eligible purchase can be found, the moneys shall be invested upon sufficient securities, with usual powers for varying the same, and the interest and dividends applied for the benefit of the parties beneficially entitled to the rents and profits of the devised premises: (see the form 2 Con. Prec., Part VII., No. XLI., clause 26, pp. 876, 877, 2nd edit.)

8. *Power to appoint Bailiffs, Agents, and Receivers.*

A power to appoint bailiffs, agents, and receivers can be very concisely penned. By this the trustees may be authorized to appoint bailiffs, agents, and receivers for the purpose of aiding them in carrying out the execution of the trusts, and to allow such agents, bailiffs, and receivers such salaries, or other reasonable compensation for their services as the trustees may think proper, with power to revoke such appointments whenever they may think fit; (see the form 2 Con. Prec., Part VII., No. XLI., clause 27, pp. 877, 878, 2nd edit.)

CHAPTER VIII.

OF THE ABATEMENT OF LEGACIES AND THE MARSHALLING OF ASSETS.

I. Of the Abatement of Legacies.
II. Of the Marshalling of Assets.

I. Of the Abatement of Legacies.

General rule as to the abatement of legacies in case of a deficiency of assets.]—Whenever a testator designs that in the event of his assets proving insufficient to pay the whole of his legacies in full, any one or more of the legatees are to have a preference over the rest, an express provision to that effect must be inserted in the will (see the form 2 Con. Prec., Part VII., No. XXIII., clause 9, p. 759, 2nd edit.); for where the assets are sufficient to pay the debts and specific legacies, but not the general legacies, the latter will be subject to abate in equal proportions, and the executor will not be permitted, as in the case of debts, to show any preference to any one legatee over another, or even to give himself a preference with regard to his own legacy, but all must abate equally: (Toll. Exors. 347; Wms. Exors. 972, 2nd edit.) But a specific legatee does not abate in proportion with the other legatees: (*Brown* v. *Allen*, 1 Vern. 31.) Still, it appears, that if a testator were to bequeath specific legacies, and also general pecuniary legacies, and to direct that such pecuniary legacies should come out of his personal estate, or words tantamount, then, if there should turn out to be *no other personal estate than the specific legacies*, they would be construed to have been intended to be subject to those which are pecuniary; otherwise the bequest

to the pecuniary legatees would be altogether nugatory: (*Sayer* v. *Sayer*, Pre. Cha. 393; Wms. Exors. 972, 2nd edit.) But a residuary legatee has no right to call upon legatees of any kind for an abatement, because his only claim is upon the surplus after the whole of the legacies shall have been discharged, so that if there is no surplus, his claim does not arise: (*Fonnereau* v. *Poyntz*, 1 Bro. C. C. 487; 1 Rop. Leg. 355, 2nd edit.)

Priority in time of payment will not prevent the abatement of the legacies.]—The circumstance of some of the legacies having a priority in time of payment, will have no effect upon the rule as to all of them abating equally where the assets are insufficient; for the court has disclaimed laying weight upon particular words, as *imprimis*, or in the first place, or a direction as to the time of payment (*Lewis* v. *Lewis*, 2 Ves. 415); as that one legacy shall be paid in three months, another in six, and another at the twelve months end; as in either case all must abate rateably if there is a deficiency of assets to discharge the whole in full (*Blower* v. *Morret*, 4 Ves. 421); for such directions mark only the order in which it occurred to the testator to name the objects of his bounty, and affords no evidence whatever that when the time of payment arrives all are not to be paid equally, and are, therefore, in perfect accordance with the presumed intention that all, according to their order in time, shall be equally paid: (*Johnson* v. *Child*, 4 Hare, 87.)

Rule as to abatement holds only as between volunteers.]—The rule with respect to abatement holds only with respect to volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of a right, claim, or interest upon the testator's estates, as a right of dower for instance (*Davenhill* v. *Fletcher*, Ambl. 444), such legatee will be entitled to a preference of payment over the general legacies which are mere bounties (Ir. Eq., b. 4, pt. 1, ch. 2, s. 2; Wms. Exors. 976, 2nd edit.); and this advantage extends to the entire legacy, although it should exceed the value of the right or interest relinquished by the legatee. But it is requisite that the right released should be an actual subsisting right at the time of the testator's death; and such as might be enforced against him; therefore, where a testator bequeathed to certain creditors, who had accepted of

him a composition of ten shillings in the pound, sums equal to the residue of their debts, it was held that the sense of moral obligation which had induced this act did not confer on the legatees any superiority of claim over the other legatees: (*Coppin* v. *Coppin*, 2 P. Wms. 292.)

Object for which the legacy is given will form no ground for abatement as between volunteers.]—As between volunteers the particular object for which a legacy is given will afford no ground for its not abating equally with the rest upon a deficiency of assets. Thus legacies to executors for their care and trouble (*Heron* v. *Heron*, 2 Atk. 121), or to friends for the purchase of mourning rings (*Apreece* v. *Apreece*, 1 Ves. & Bea. 364), or to servants (Wms. Exors. 978, 5th edit.), or to charities, are not to be preferred to any other legacies; neither is the wife of a child of a testator in any better predicament in this respect than a mere stranger: (*Blower* v. *Morrett*, 2 Ves. sen. 420.) And an annuity chargeable on the personal estate is regarded in the same light as a general legacy, and must abate with the rest of the general legatees: (*Hume* v. *Edwards*, 3 Atk. 693.)

As to power of testator to confer a preference of payment.] —But notwithstanding any directions by a testator, with respect to priority in the time of payment of legacies, will be insufficient to prevent such legacies from abating proportionably with the other general legacies upon a deficiency of assets, the testator may, nevertheless, provided he make use of such expressions as to leave no doubt as to his real intent, give one general legatee a preference over another, as well in amount, as in the time of payment; as in a case (*Marsh* v. *Marsh*, 2 P. Wms. 668) where a testator gave legacies to his two sons and his daughter, with a proviso that if the assets should fall short for the satisfaction of those legacies, his daughter should, notwithstanding, be paid her full legacy, and the abatement be borne proportionably by the legacies to the sons only.

To confer a preference the terms must be plain and unequivocal.]—But to confer this preference the terms of the will must be clear, plain, and unequivocal; for if the expressions are at all ambiguous, and do not mark the testator's intention with sufficient certainty, no such preference will be allowed. Hence, it is not sufficient that a testator gives a direction as to a general legacy to his wife, that it shall be paid immediately after his death out of the first moneys that shall be received by his executors: (*Blower* v. *Morrett*,

2 Ves. sen. 420.) And where a testator gave his personal estate to executors in the first place to pay debts, funeral, and testamentary expenses and legacies, and in the next place legacies to three persons, B., C., and D., with legal interest for three months after his death; and afterwards to raise and set apart three sums of money, to be applied as therein mentioned, upon a question of abatement, the court declared, upon the principle before stated, that none of the legacies were entitled to priority of payment, and that therefore all of them must abate proportionably: (*Beeston* v. *Booth*, 1 Mad. 161.)

As to legacies made payable out of a specified fund.]—But where legacies are charged upon and made payable out of any certain specified fund, then, although the legatees must abate amongst each other in case the fund should turn out insufficient to pay them all in full, they will in no wise be compelled to abate with the other general legatees; and in this, as in the preceding cases, the testator's intent is the principle by which the court is guided; for it is inferred that a testator, in referring to the specific parts of his estate for payment of particular legacies, intended those legacies a preference to others he had not so secured: (*Roberts* v. *Roberts*, 4 Ves. 150; *Acton* v. *Acton*, 1 Mer. 178; 1 Rop. Leg. 316, 3rd edit.; Wms. Exors. 980, 2nd edit.)

As to specific legacies.]—With respect to specific legatees, although they cannot be called upon to abate as long as any assets not specifically bequeathed remain unappropriated to payment of debts, still, if the general assets prove insufficient for that purpose, they must abate in proportion to the value of their individual legacies (*Herne* v. *Edwards*, 3 Atk. 693; 2 Fonbl. Eq. 377); for though not liable to abate with general legatees, still, where the assets prove deficient, specific legatees are liable to abate amongst each other (*Roberts* v. *Pocock*, 4 Ves. 160); otherwise some of the specific legatees might be called upon to contribute more than a just proportion, and thus confer an unfair preference upon the others, all of whom are equally bound to sustain their portions of the charge: (see 1 Rop. Leg. 313, 3rd edit.; Wms. Exors. 980, 981, 2nd edit.)

II. OF THE MARSHALLING OF ASSETS.

General rule as to the marshalling of assets.] — With respect to the marshalling of assets it has long been an

established principle of equity, that every claimant upon the assets of a deceased person shall be satisfied so far as such assets can, by any mode of arrangement consistent with the respective claims, be applied in satisfaction thereof; hence, where there are two claimants, and one of them has more than one fund to resort to, and the other claimant only one, the first claimant will be compelled to resort to that fund on which the second has no lien, where such a course becomes necessary for the satisfaction of both the claims: (*Gibson* v. *Seagren*, 20 Beav. 614.) Thus, if there is a debt due to the King, a court of equity will marshal the assets by directing it to be paid out of the real estate, so that the other creditors may have satisfaction out of the personal estate: (1 Ventr. 445.) And in like manner, where the deceased died before the act 3 & 4 Will. 4, c. 104, came into operation, if a specialty creditor, whose debt was a lien on the real estate, received satisfaction out of the personal assets, a simple contract creditor, who had no other fund than the latter to resort to, was allowed to stand in the place of the specialty creditor as against the real assets, so far as the latter should have exhausted the personal estate in payment of his specialty debt (*Selby* v. *Selby*, 4 Russ. 341; Toll. Exors. 419); and the rule was exactly the same with respect to real assets devised as to those descended: (*Id. ib.*) And, it seems, that if, since the above-mentioned act of 3 & 4 Will. 4, c. 104, came into operation, and by which the real estate is made liable to simple contract debts, a simple contract creditor should receive satisfaction out of the personal estate, and thereby exhaust it, that the legatees would be allowed to stand in his place as against the real assets which have descended (Wms. Exors. 1552, 5th edit.); for wherever there is a deficiency created in the personal estate by the payment of specialty debts, equity interposes, and directs that the legatees who have only the personal fund to resort to, shall stand in the place of those creditors who have been paid out of the personal assets. But this equity, so far as relates to general legacies, only extends as against the lands descended (*Keeling* v. *Brown*, 5 Ves. 359), and not as against the lands devised, whether such lands be devised specifically, or comprised in a general devise of the residue of the testator's real estate (*Mirehouse* v. *Scarfe*, 2 M. & Cr. 695), unless the lands be expressly charged with debts; but if so charged, then the assets will be marshalled; for lands so charged are applicable to the payment of debts before general pecuniary legacies: (*Surtees* v. *Packin*, 19 Beav. 406.)

As to specific legacies.]—With respect to specific legacies the rule appears to be, that the assets shall be so far marshalled against the devisees of the real estate, as that upon the failure of the general personal estate, the devisee and specific legatee shall, each in proportion to their respective gifts, contribute to the payment of the specialty debt: (*Gervis* v. *Gervis*, 14 Sim. 654.)

Assets marshalled in favour of legatee where some are charged on real estate, and others not so charged.]—Assets will also be marshalled in favour of legatees where one or more legacies are charged on the real estate, and there is another legacy which is not so charged, in which case the legatee whose legacy is not so charged, will stand in the place of the former legatees to be satisfied out of the real assets: (*Bonner* v. *Bonner*, 3 Ves. 379.) Neither is there any distinction between the case of a class of legacies, and a case of individual legacies; for the court presumes that the testator's intention in charging the lands is, that all the legacies shall be paid in full: (*Scales* v. *Collins*, 9 Hare, 656; Wms. Exors. 1156, note *k*.)

Assets will not be marshalled in favour of a charitable bequest.]—A court of equity will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal assets, it being void so far as it touches any interest in land or in things savouring of the realty: (*Sturge* v. *Dimsdale*, 6 *ib.* 462.)

CHAPTER IX.

CHARITABLE USES.

It seems that gifts in mortmain were prohibited by *Magna Charta*, yet that no restraint whatever was imposed upon devising lands to charitable uses by the Statute of Wills (32 Hen. 8, c. 1, explained by statute 34 & 35 Hen. 8, c. 5), and the statute 43 Eliz. c. 4, even tended to encourage dispositions of this kind: (*Attorney-General* v. *Burdett*, 2 Ves. 755.) But as devises to charitable uses, like all other gifts of lands in mortmain, rendered the property for ever unalienable, great public inconvenience must eventually have ensued if dispositions of this kind had been carried on to any considerable extent; which in course of time became so obvious, that the Legislature at length thought proper to interfere and put a proper check upon gifts of this nature. This was carried into effect by the statute 9 Geo. 2, c. 36, commonly, though not very accurately, called "the Statute of Mortmain."

Statute of Mortmain, 9 *Geo.* 2, *c.* 36.]—This statute, after reciting that gifts or alienations in mortmain were prohibited by *Magna Charta*, and divers other wholesome laws, as prejudicial to, and against the common utility, nevertheless the public mischief had greatly increased by large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs, for remedy whereof it is enacted that from and after the 24th day of June, 1736, no manors, lands, rents, tenements, advowsons or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other personal estate whatsoever to be

laid out and disposed of in the purchase of any lands, tenements or hereditaments, shall be given, granted, aliened, limited, released, assigned, transferred or appointed, or in anywise conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise for any estate or interest whatever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment or settlement of any such lands, tenements or hereditaments, sum or sums of money, or other personal estate (other than stock in the public funds), be made by deed, indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at the least before the death of such donor or grantor (including the days of execution and death), and be enrolled in the High Court of Chancery within six calendar months next after the execution thereof; and unless such stock be transferred in the public books usually kept for the transfer of stock, six calendar months at least before the death of such donor or grantor (including the days of transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any other person or persons claiming under him: (sect. 1.)

By the three next sections (2, 3, and 4), the act is declared not to extend to purchases for a valuable consideration actually and *bonâ fide* made; nor to dispositions to or in trust for either of the two English Universities, or for the Colleges of Eton, Winchester, or Westminster, for the better support of the scholars upon the foundation of the same Colleges; or to the disposition of any real or personal estate in Scotland.

What particular kinds of property are within the scope and operation of the act.]—With respect to the kind of property prohibited to be given by will to charities, it is quite clear that copyholds, and even leasehold estates for years, are within the operation of the act, which in fact comprehends every species of property which savours of the realty: (*House* v. *Chapman*, 4 Ves. 542.) So, also, moneys secured upon turnpike tolls (*Knapp* v. *Williams*, 4 Ves. 430), shares in the Grand Junction Waterworks Company (*Ware* v. *Cumberland*, 25 L. T. Rep. 138), or by an assignment of poor rates, or county rates (*Finch* v. *Squire*, 10 Ves. 41), or any money secured upon mortgages of real property of every kind or

description, whether corporeal or incorporeal, and whether consisting of a freehold, or of a mere chattel interest (*Attorney-General* v. *Earl of Winchelsea*, 3 Bro. C. C. 373), moneys secured by rates levied under a local act for building a town-hall, and recoverable by distress (*Thompson* v. *Kempson*, 23 L. T. Rep. 136), and even judgment debts, so far as they operate as an actual charge upon the land, will come within the scope and operation of the act: (*Negus* v. *Coulter*, Wms. Exors. 778, 2nd edit.) In *Howse* v. *Chapman*, above referred to, it was held that a devise of canal shares was within the statute, which, upon the same principle, would seem also to include railway shares; but in a more recent case (*Re Langham's will*, 22 L. T. Rep. 63), a distinction was taken between a gift of the shares themselves, and of a sum of money secured by way of mortgage upon the same shares. In the case last alluded to, A. by will gave to a charity canal shares, which were declared by act of Parliament to be personal estate, and also a sum of money secured by mortgage of tolls of the same canal, the gift of the shares was held to be good, but the bequest, as in the mortgage of such shares, was held to be within the Statute of Mortmain.

What kind of interests do not come within the operation of the act.]—It appears to have been established by several of the more modern decisions, that such shares held under public companies as do not savour of the realty, will not fall within the scope of the act, and this the more particularly as most, if not all the acts of Parliament by which these companies are constituted, negative in the most express and positive terms the qualities of real estate from being applicable to the shares; and by the 7th section of the Companies Consolidation Act (8 Vict. c. 16), it is expressly declared "that all shares in the undertaking shall be personal estate, and transmissible as such, and shall not be in the nature of real estate." Thus it has been held that the shares in a gas-light company (*Spurling* v. *Parker*, 9 Beav. 450), and of shares in a dock company (*Hilton* v. *Girard*, De Gex & Sm. 183), and policies of assurance by which the directors engage to pay out of the funds, are not considered as savouring of the realty, although in the latter instance the assets of the assurance company consist in part of real estate: (*March* v. *Attorney-General*, 5 Beav. 433.) In *Hilton* v. *Girard*, also (above referred to), which arose out of a bequest of shares in the London Dock Company and West India Dock Company, Sir J. Knight Bruce, V.C., said: "I am of opinion that stock in the incorporated companies in ques-

tion, in which the shareholders are interested in the profits to be made, is not considered as 'estate, interest, or hereditaments' within the meaning of the act of King George the Second." The stock, therefore, entitled "East India Stock," has been clearly held not to be within its operation: (*Attorney-General* v. *Giles*, 5 L. J. (N. S.) 44, Ch.)

As to testator's lien on lands sold for his unpaid purchase money.]—It has, however, been determined that where a testator who has bequeathed all his personal estate to charities, afterwards contracts to sell any of his lands, the equitable lien which he has upon the property sold for his unpaid purchase moneys will be an interest in lands within the meaning of the mortmain act, and will not pass with the rest of the personal estate: (*Harrison* v. *Harrison*, 1 Russ. & Myl. 71.)

The purchase money upon a sale of real property is an interest savouring of the realty within the meaning of the act.] —The purchase moneys to which the testator is entitled upon a sale of his real estate, is an interest in the realty within the meaning of the act: (*Trustees of the British Museum* v. *White*, 2 Sim. & Stu. 595.) Still, if a pecuniary gift to a charity is charged partly upon real, and partly upon personal estate, it will be good *pro tanto*, or in other words, it will be good as far as the charge on the personalty extends, but void as to the charge upon the lands: (*Waite* v. *Webb*, 6 Mad. 71.)

Freemen of London may devise lands in mortmain.]—The Statute of Mortmain does not apply to lands situate within the city of London which belong to freemen of that city, as they, by the custom of London, are authorized to devise any lands they possess within its limits to any charitable uses they think proper: (*Middleton* v. *Cater*, 4 Bro. C. C. 409; Bac. Abr. Custom of London (A.); Wms. Exors. 780, 2nd edit.)

Mortmain act how far local in its operation.]—With respect to the lands to be devised, it must be observed that the mortmain act is local in its operation, and consequently it does not prohibit dispositions of real estate, or personal property connected with real estate, or other things savouring of the realty in Ireland (*Campbell* v. *Lord Radnor*, 1 Bro. C. C. 272), or in the West Indies (*Attorney-General* v. *Stewart*, 2 Mer. 143), or to lands in New South Wales

(*Whicker* v. *Hume*, 18 L. T. Rep. 325), or to any other of our colonial possessions. But the converse of this rule does not hold; for bequests of personal estate connected with real estate in England, or to be laid out in the purchase of lands in Ireland, or in any of our colonies, for charitable uses, will come within the mortmain act, and be void accordingly. And notwithstanding the exception of the mortmain act with respect to lands in Scotland, money directed to be laid out in lands, or in any heritable securities, in that country, will come within the provisions of the act: (*Macintosh* v. *Townsend*, 16 Ves. 330.) And where a Scotchman by his will in the English form, made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust to lay out the same in the purchase of lands, or rents of inheritance in fee simple, for the intent expressed in an instrument bearing even date with his will, and by that instrument he directed the trustees of his will to pay the rents annually to certain other trustees, who were at all times to be persons residing within twenty miles of Montrose, to be by them applied to the relief of the indigent ladies of Montrose, or within twenty miles of that town, it was holden by Lord Lyndhurst, and afterwards by the House of Lords, that the bequest was void under the statute: (*Attorney-General* v. *Mill*, 3 Russ. 328; 2 Dow. & Cl. 393.)

Bequests of personal estate to charities will generally be good.]—A bequest to charities payable out of personal estate will generally be good, provided it be not directed to be laid out in the purchase of lands; but if given for that purpose it will then come within the very words of the act, and even a bare recommendation to purchase lands will be considered as imperative as a direct command to that effect: (*Attorney-General* v. *Davies*, 9 Ves. 546.) It seems, however, that if an option be given to the trustees either to lay out the money in buying lands, or to invest it in the funds, it will be unaffected by the statute (*Loresby* v. *Hollins*, Amb. 212); but if the ultimate direction is the purchase of lands, a mere direction that the moneys shall be invested in the funds until an eligible purchase can be found will be insufficient to protect the bequest from the operation of the statute: (*Pritchard* v. *Arbouin*, 3 Russ. 458.) Still, if the object of the charity can be accomplished without purchasing land, the bequest may be effectual; as, for example, where personal estate is given for the perpetual endowment of a school, the bequest may be supported, for it does not follow that

land must necessarily be bought for the purpose, as the same object might be attained by renting premises, or the master might carry on the school in his own house: (*Kirkbank* v. *Hudson*, 7 Pri. 221; *Hill* v. *Jones*, 23 L. T. Rep. 523: see form of bequests of sums of money to schools, and other charitable institutions, 2 Con. Prec., Part VII., No. XXIV., clauses 2 to 10, p. 765, 2nd edit.)

A bequest to repair or rebuild premises already in mortmain is not within the act.]—A bequest of money directed to be laid out in building or repairing that which is already in mortmain will also be supported; as in or towards rebuilding a church, or repairing a free chapel, or a parsonage house, or a school house, or in repairing any building devoted to charitable purposes; for, as no additional land is thereby converted into mortmain, none of these gifts come within the operation of the mortmain act: (*Attorney-General* v. *Parsons*, 8 Ves. 186; see the form of a bequest of this kind, 2 Con. Prec., Part VII., No. XXIII., clauses 3 and 6, pp. 758, 759, 2nd edit.; *id. ib.* No. XXV., clauses 1 and 2, pp. 767, 768.)

Whether a bequest to be applied in discharge of incumbrances comes within the operation of the act.]—But it seems that a direction annexed to a pecuniary bequest to charities that it shall be applied in discharge of existing incumbrances charged upon charity property, will be considered as appropriating to the charity a new interest in land within the meaning of the act; as where a bequest was made of a sum of money to be applied in paying off a mortgage debt on a meeting-house, it was, for the reasons above mentioned, decided that the bequest could not be supported (*Corbyn* v. *French*, 4 Ves. 418); and the circumstance that the charge is a mere equitable incumbrance will in no wise vary the rule: (*Waterhouse* v. *Holmes*, 1 Sim. 162.)

Mortmain act cannot be evaded by a secret trust.]—Neither can the operation of the mortmain act be evaded by a secret trust, and a testator's heir may compel a devisee to disclose any promise which he may have made to a testator with respect to devoting the devised lands to any charitable purposes: (*Paine* v. *Hall*, 18 Ves. 475.) And if the devisee should deny that he has ever made a promise of the kind, extrinsic evidence still may be admitted to prove the fact (*Edwards* v. *Pike*, 1 Cox, 17); and if such secret trust can by any means be established, it will be sufficient to vacate the devise, and thus let in the title of the heir at law.

How far the cy pres doctrine is applicable to charitable bequests.]—Where charity is the general object of the bequest, it will not fail altogether on account of the charity to which it was devoted having ceased to exist, or a refusal to accept the proferred bounty; or even where the object of the charity is contrary to law, or to the established religion of the land; for in all cases of this description it will devolve upon the Crown to appoint the fund, by sign manual sent to the Attorney-General, to other charitable purposes corresponding as nearly as may be to the testator's original intention: (*Attorney-General* v. *Glasgow College*, 10 Jur. 676.)

Charity should be properly described, for if too vaguely expressed it will fail altogether.]—The object of the charity should be clearly expressed, so as to leave no doubt whatever as to what the testator's intention upon the subject really was; for, notwithstanding the liberal construction that has been allowed in the case of bequests of this kind, where, when the evident object of the bequest has been charity, the bequest has been allowed to take effect as nearly as circumstances would admit of, when it could not possibly be carried out to the very letter, still, instances have occurred where the bequest has been held to be altogether inoperative, in consequence of the language of the will being so vague or ambiguous as to render it impossible to ascertain what persons were to be the actual objects of the intended charity; as in the case of a bequest to the Bishop of Durham "*to dispose of to such objects of benevolence and liberality as he should approve*," which was considered too vague to amount to a charitable bequest, and therefore the bishop was holden to be a trustee for the testator's next of kin: (*Morrice* v. *Bishop of Durham*, 9 Ves. 408; S. C. 10 *ib.* 532.) And, upon the same principle, it was subsequently determined that a bequest for such charitable or other purpose as the trustees should think fit, was altogether void for uncertainty: (*Ellis* v. *Selby*, 7 Sim. 352.) And where a testatrix declared that she wished certain moneys, which she specified "*to be given in private charity*," Sir Thomas Plumer held that the words did not create such a trust as could be carried into effect. The charities recognized by the court were public in their nature, and such as the court could see to the execution of; but here the disposition was confined to private charity, assisting individuals in distress was private charity; but such a purpose could not be executed by the court, or by

the Crown: (*Ommaney* v. *Butcher*, Turn. & Russ. 290.) And in a still more modern case (*Kendall* v. *Granger*, 5 Beav. 300), Lord Langdale, Master of the Rolls, held that a bequest to trustees, for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, to be altogether void as a charitable bequest.

As to title of the charity.]—If the testator creates an original charity, it will be proper to state by what denomination the charity is to be distinguished: (see the form 2 Con. Prec., Part VII., No. XXIII., clause 4, p. 758, 2nd edit.; *id. ib.* No. XXV., clause 6, p. 768.)

It should be stated in what manner the moneys bequeathed are to be paid, invested, and applied.]—It will be proper also in most instances to direct into whose hands the moneys are to be paid, or in what manner the moneys are to be invested and applied. If the investment is to be made by trustees, the trusts should be declared in the same manner as investments for other purposes; and where the trustees are to be empowered to vary securities, the powers should be limitèd in like manner (as to which see *ante*, p. 868; see the form 2 Con. Prec., Part VII., No. XXIII., clause 2, pp. 757, 758, 2nd edit.); and it should then be declared in what manner the fund is to be applied: (see the form *id. ib.* clause 3, p. 758.) Where moneys are bequeathed to existing charitable institutions, it is generally directed to be paid into the hands of the treasurer or treasurers for the time being of such institutions, to be applied for the general purposes of the charity; to which it will be proper to add a declaration that the receipts of such treasurer or treasurers for the time being shall be a sufficient discharge, and effectually indemnify the parties taking the same from all responsibility with respect to the application of the moneys therein expressed to have been received: (see the form *id. ib.* No. XXIII., clause 8, p. 759; *id. ib.* No. XXIV., clause 11, p. 765.)

Where the charity is to be applied under the direction or superintendence of some particular class of persons.]—Sometimes the charity is directed to be applied under the superintendence and direction of a particular class of persons, or of parties filling certain offices, as in case where moneys are to be expended in providing loaves or blankets to be distributed amongst the poor; in which case the trustees

are directed to supply the necessary funds, or the loaves or blankets to be distributed, but the distribution itself is directed to be made by the minister and churchwardens of the parish for the time being, or some other persons whom the testator has thought proper to select for that purpose, and whose power of distribution the trustees have no right or power whatever to interfere with: (see the form 2 Con. Prec., Part VII., No. XXII., clauses 5 and 7, pp. 758, 759, 2nd edit.)

If charitable bequests are to be free of legacy duty, it should be so expressed.]—If it is designed that the charitable bequests are to be paid free of all legacy duty, it will be necessary to say so in the will: (see the form 2 Con. Prec., Part VII., No. XXIV., clause 11, p. 765, 2nd edit.)

If charitable bequests are to have priority of payment, it should be so stated.]—Whenever, as is generally the case, it is the testator's wish that the charitable bequests should have a priority in payment over other legacies, it will be proper to direct that they shall be paid exclusively out of the personal estate (see the form 2 Con. Prec., Part VII., No. XXIII., clause 12, p. 765, 2nd edit.), because legacies to charities abate in proportion with other legacies in case of a deficiency of assets (*Attorney-General* v. *Robins*, 2 P. Wms. 23), and cannot, under any circumstances whatever, be paid out of real estates charged with the payment of legacies, nor, as we have noticed in the preceding chapter, will assets be marshalled in favour of charitable bequests (*Makeham* v. *Hooper*, 4 Bro. C. C. 135); so that where the real estate is charged with the payment of legacies, but there is no direction that the charitable legacies shall be paid exclusively out of the personal estate, the other legatees will be entitled to come first upon the general personal estate *pari passu* with the charity legatees, and then to resort to the real estate to make up what the personal estate shall prove insufficient to satisfy; whereas the charity legatees will neither be entitled to come upon the real estate, nor to throw the other legacies upon that fund in aid of the personal estate, which is the only fund out of which the charitable legacies can be paid. If any of the charitable bequests are to abate more than the others in case of a deficiency of assets, it will be necessary to insert an express proviso to that effect.

A greater number of trustees generally appointed in chari-

table bequests than in ordinary cases.]—Where the charitable purpose is to be carried out by trustees appointed by the testator, it is usual to appoint a greater number of persons to the office than is commonly done in ordinary cases; and in the clause directing the appointment of new trustees to supply vacancies in the trusteeship incurred by the death, retirement from office, &c., of any of the trustees, it is generally provided that a certain number of trustees shall always be kept filled up. In other respects, the clause runs much in the same form as the power to change trustees in ordinary cases: (see the form 2 Con. Prec., Part VII., No. XXIII., clause 11, p. 762.)

What donations are considered as charitable uses within the mortmain act.]—It now remains for us to point out what kind of donations are considered as gifts to charitable uses within the mortmain act (9 Geo. 2, c. 36.) In the statute 43 Eliz. c. 4, gifts for the relief of aged, impotent, and poor people, for maintenance of sick and maimed soldiers and mariners; for ease of poor inhabitants concerning payment of taxes; for aid of young tradesmen, handicraftsmen, and persons decayed; for relief, stock, and maintenance of houses of correction; for marriage of poor maids; for education and preferment of orhpans, for schools of learning, free schools and scholars in universities; for relief and redemption of prisoners and captives; for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways, are all enumerated as charities (Wms. Exors. 781); and all bequests for any such purposes, or purposes of a like nature, are considered as bequests to charitable uses within the Statute of Mortmain. Hence, not only bequests for the relief and education of the poor, as by means of schools (*Attorney-General* v. *Nash*, 3 Bro. C. C. 588); or hospitals (*Pelham* v. *Anderson*, 2 Eden, 296); or to the poor inhabitants not receiving alms of a particular parish (*Attorney-General* v. *Clarke*, Ambl. 422); or to the widows and children of seamen belonging to a particular place (*Powell* v. *Attorney-General*, 3 Mer. 48); and to the widows or orphans of the parish of A. (*Attorney-General* v. *Comber*, 2 Sim. & Stu. 931); but also bequests for public purposes conferring a public benefit, whether local or general (*Attorney-General* v. *Pearce*, 2 Atk. 88); as a bequest to the British Museum (*British Museum* v. *White*, 2 Sim. & Stu. 59); or for the construction or improvements of waterworks for the use of the inhabitants of a particular town or city (*Jones* v. *Williams*, Ambl. 651); or of a perpetual botanical garden for the

public benefit (*Townley* v. *Bedwell*, 6 Ves. 164); or for the general improvement of a town or city (*Howse* v. *Chapman*, 4 Ves. 542); or for the establishment of a life-boat: (*Johnson* v. *Swann*, 3 Mad. 457.) So, likewise, bequests for religious purposes; as for the advancement of the Protestant religion, or the promotion of the Christian religion amongst the Jews or any other class of unbelievers (*Attorney-General* v. *Virginia College*, 1 Ves. 233); or for the establishment of a preacher of a particular chapel (*Grieves* v. *Case*, 4 Bro. C. C. 67); or for the benefit of poor dissenting ministers (*Waller* v. *Childs*, Amb. 542; *Attorney-General* v. *Fowler*, 15 Ves. 85); or a bequest of an annual sum to the clerk of a parish to keep the chimes in repair, or to play certain psalms (*Turner* v. *Ogden*, 1 Cox, 316); or to the clergyman of a particular parish for preaching an annual sermon on a particular day (*Soresby* v. *Hollins*, 9 Mod. 221; *Durour* v. *Motteaux*, 1 Ves. sen. 320); or to be paid on a certain day to the singers sitting in the gallery of the church (*Turner* v. *Ogden*, *sup.*); have all been adjudged to be charitable donations within the letter and spirit of the mortmain act: (Wms. Exors. 782.)

As to bequests to Queen Anne's Bounty.]—Before the statute 43 Geo. 3, c. 107, even bequests to the corporation of Queen Anne's Bounty for the augmentation of small livings, were holden to be bequests to charitable uses within the meaning of the mortmain act; because, by its rules, the corporation were bound to lay out the money so bequeathed to them in lands (*Middleton* v. *Clitherow*, 5 Ves. 734); but under the provisions of the above-mentioned act of the 43 Geo. 3, not only may money be bequeathed to the corporation of Queen Anne's Bounty, but even a devise of real estate to them may, under certain restrictions hereinafter mentioned, be rendered valid, (that is to say), the act of 43 Geo. 3, c. 108, empowers all persons, by will executed at least three months before death, to bequeath all their estate in real property not exceeding five acres, or goods and chattels not exceeding the value of 500*l.*, for the creating, rebuilding, repairing, purchasing or providing any church or chapel, where the liturgy of the Church of England shall be used, or any mansion-house for the residence of any minister of the Church of England officiating in such church or chapel, or any outbuilding, churchyard, or glebe of the same respectively. The same act also provides, that any gift exceeding five acres, or 500*l.*, is to be reduced by order of the Chancellor on petition, and that no glebe containing upwards of fifty acres shall be augmented by more than one acre. An

important and interesting point of law arising upon the construction of the last-mentioned statute (43 Geo. 3), has been decided in the *Incorporation Society* v. *Coles* (reported in 24 L. T. Rep. 167.) In that case B., by will executed three months before his death, gave lands in trust for sale, and directed the produce to be invested in the public funds, to be made over to the treasurer of the Church Building Society to be applied for the purposes of the society. It was held that the above-mentioned statute (43 Geo. 3), which permits persons, by will executed three months before death, to give lands not exceeding five acres, or goods not exceeding 500*l.* in value, for erecting any chapel or church, did not mean a general vague gift, but a gift to some particular church, and that therefore the above bequest was void under the Statute of Mortmain.

Gifts ostensibly for charitable purposes may be void as against public policy.]—Gifts given ostensibly for charitable purposes, even where they consist of personal estate, will be rendered void where the object of them is contrary to public policy; as in the instance of a bequest of personal estate to be applied towards the political restoration of the Jews to Jerusalem, which has been declared to be void upon the ground of being against public policy, being, in fact, nothing more nor less than a gift for the purpose of creating a revolution in a foreign state: (*Habershon* v. *Vardon*, 17 L. T. Rep. 126.)

What species of donations connected with sacred or solemn purposes have not been considered as gifts for charitable purposes.]—With respect to those species of donations which have been devoted to sacred or solemn purposes which have not been treated as coming within the scope and operation of the mortmain act, it has been held that a bequest of money to be raised out of real estate for the purpose of erecting a monument, with a view of perpetuating the name of the donor, is not a charitable purpose within the Statute of Mortmain (*Mellick* v. *The Asylum*, 1 Jac. 180); neither is a trust to repair, and if need be, to rebuild, a vault and tomb to contain the testator's remains a charitable use: (*Doe* v. *Pitcher*, 3 Man. & Selw. 407.) Lord Ellenborough, C. J., is, however, reported to have said, that notwithstanding it was not a charitable use with respect to the testator's own interment, it was so with respect to the other members of his family. But the correctness of this distinction appears questionable; for the true distinction seems to

be between gifts for the benefit of the family of the donor, and of strangers: and Gibbs, C. J., said (3 Man. & Selw. 410), "the plaintiff's counsel next insists the residue of the land is applicable to a charitable use, because the condition is that the donee shall keep in repair a vault to receive the body of the donor or any of her family. We agree with the Court of King's Bench that this is not a charitable use."

A bequest is not rendered charitable on account of the professional character of the party to whom it is given.]—A bequest will not be rendered charitable on account of the professional character of the party to whom it is given, nor will the circumstance of the gift being accompanied with an expression of the testator's intention that he will discharge the duties incidental to that character be sufficient to render the bequest charitable. Hence, where a testator devised to A., preacher to the meeting-house at C., for life, upon condition that he should, immediately after the testator's decease, settle and convey the same to trustees, to take place at his (A.'s) decease, for the support of the preaching of the word of God at the meeting-house for ever; and in case the preaching there should be discontinued, then over to a charity school; it was held, that although the subsequent limitation was void, as coming within the mortmain act, it did not nullify the devise of the preceding life estate; and also, that the religious persuasion of the devisee raised no ground of objection to his taking that estate; and that the devise over to the school in case the preaching should be discontinued related to the limitation after the defendant's death: (*Doe ex dem. Phillips* v. *Aldridge*, 4 T. R. 264.)

Exceptions in the Statute of Mortmain in favour of the two English Universities and the Colleges of Eton, Winchester, and Westminster.]—With respect to the two exceptions in the Statute of Mortmain as to the two Universities of Oxford and Cambridge, and the Colleges of Eton, Winchester, and Westminster, it has been holden that the Legislature meant to except such devises only as were really and *bonâ fide* for the benefit of the Colleges, and not those in which the legal interest only passes to the College for other charitable purposes: (*Attorney-General* v. *Mumby*, 1 Mer. 327.) It was also said by Lord Northington, in the case of *Attorney-General* v. *Tancred* (1 Eden, 15), that the exception extends only to colleges established in the University at the time of the statute, and consequently would not include colleges founded since that time, as Downing College, for instance;

but this distinction was doubted by Lord Loughborough, in *Attorney-General* v. *Bowyer* (3 Ves. 728), and in this doubtful state the question still remains.

Restriction as to the number of advowsons to be held by colleges now repealed.]—The restriction as to the number of advowsons to be held by the colleges belonging to the two Universities of Cambridge and Oxford, which was imposed by the mortmain act, has been since repealed by the statute 45 Geo. 3, c. 101.

CHAPTER X.

OF THE APPOINTMENT OF EXECUTORS.

According to the old authorities, both of the civil (Swin. Part 1, s. 3, pl. 19; Godolphin, Part 1, c. 1, s. 2) as also of the common law (*Woodward* v. *Davey*, Plow. 185), the appointment of an executor formed one of the essential properties of a will, without which it was considered no proper testament, but an unsolemn instrument, termed a codicil or *codicillus*, the diminutive of *codex*, a will or testament. But this strictness has long since ceased to exist, and so far from any great solemnity of form being now required to constitute a will, any written paper containing a disposition of the property to be made after the testator's death, if properly executed and attested, will be allowed to operate as a will. Neither, in the appointment of executors, is it necessary that any precise form of words should be used, if the language of the will is sufficient to show that the testator intended to commit the charge of that office, or the rights which appertain to it, to any one or more persons named by him in his will: (Swin. Part 4, s. 4, pl. 3.) As, for example, if he were to declare that A. B. shall have his goods after his death, to "pay his debts, and otherwise to dispose of at his pleasure," or to that effect, by this A. B. is made executor: (*Henfrey* v. *Henfrey*, 4 Moore, P. C. C. 33.) And a direction by will to pay debts, funeral charges, and the expenses of proving the will, has been holden sufficient to confer the executorship upon the parties to whom these directions were given: (*In the goods of Fry*, 1 Hagg. 80; see also *Grant* v. *Leslie*, 3 Phillim. 116.)

Executorship may arise by implication.]—The appointment of an executor may also arise by implication; as, for example, if a testator were to say, "I will that A. B. shall be my executor if C. D. will not, in which case C. D. may be

admitted, if he please, into the executorship (Godolph. Part 2, c. 5, s. 3); so, where a testator gave a legacy to A. B., and several legacies to other persons, amongst the rest to his daughter-in-law, C. D., immediately after which legacies followed these words, "but should the within-named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last will and testament, and give her the residue," probate was decreed to C. D. as executrix by implication, according to the tenor of the will. And where a testator directed that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S., J. S. was thereby held to be made executor until the son attained the prescribed age: (*Brightman* v. *Keighley*, Cro. Eliz. 43.)

In whatever way executors derive their office there is no distinction in their duties.]—Executors who derive their office from constructive appointments, like those we have just mentioned, are termed "executors according to the tenor," to distinguish them from those executors who are expressly appointed to the office: (Swin. Part 4, s. 4, pl. 3; Went. Off. Exors. 20, 14th edit.; Wms. Exors. 209, 5th edit.) But whichever way they may be appointed, there is no distinction in their offices; and although, where there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection, either in principle, or in practice, to admit an executor according to the tenor to probate jointly with an executor expressly nominated: (Wms. Exors, 213, 5th edit.; *Lynch* v. *Bellew*, 3 Phill. 424.)

Executors, however numerous, all considered as one individual.]—If several executors are jointly appointed, they are all considered as one individual person (Toll. 37); so that the acts of any one of them in respect of the administration of the effects, are deemed to be the acts of all; for they have all a joint and entire authority over the whole property: (Shep. Touch. 484; 3 Bac. Abr. 30; Com. Dig. Admon. B. 12; *Owen* v. *Owen*, 1 Atk. 495; *Ex parte Rigby*, 19 Ves. 462.) But a testator may, if he pleases, divide the authority of his executors with respect to the subject-matter over which their executorship is to extend; as in the instances we have already noticed, where a testator has bequeathed to a party a leasehold estate, or a share in his trade or business, and appointed him a special executor as to this portion of his property for the purpose of relieving his

general executors from all liabilities respecting it: (see *ante*, p. 758.) In like manner a testator may make A. executor for his plate, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due to him (Dyer, 4 a; Went. Off. Exors. 29, 14th edit.; *Auster* v. *Audley*, 1 Roll. Abr. 914, pl. 4); for there is no objection that a will should contain an appointment for one executor for one purpose, and another for other purposes, or one for general, and one for limited purposes: (*Lynch* v. *Bellew*, 3 Phillim. 424.) Yet, notwithstanding a testator may thus appoint separate executors of distinct parts of his property, and may divide their authority, yet, as far as creditors are concerned, they will all be considered as executors equally, and as one executor, and may be sued as such accordingly: (*Rose* v. *Bartlett*, Cro. Car. 293.)

The appointment of an executor may also be a qualified one, or it may be conditional.

How qualified appointment of executors may be restricted.]—In the case of a qualified appointment of executors, it may be restricted—1. As to the time at which it is to begin, or to cease; 2. As to the place at which the office is to be exercised; and 3. As to the subject-matter over which the executorship is to extend.

1. *As to time.*]—The time at which the executor shall begin to execute his office, or when his office is to cease, may be either a certain or an uncertain period; as at the expiration of five years after the testator's death (Swin. Part 4, s. 17, pl. 1), which is a certain time, or upon the death or marriage of his son, which is an uncertain period: (Swin. Part 4, s. 17, pl. 4.) The appointment may also be made to endure for a limited period only, as for five years next after the testator's decease, or during the minority of his son, or the widowhood of his wife: (*Pemberton* v. *Cony*, Cro. Eliz. 164.) In all which cases, if the testator does not appoint some one or other to act before the time limited for the commencement of the office in the first instance, or after the period limited for its expiration in the other, administration may be granted with the will annexed, until there be an executor, or after the executorship is ended: (Plowd. 279, 281; Wms. Exors. 218, 5th edit.)

2. *As to limitation with respect to place.*]—With respect to the limitation as to the place in which the executorship is to be exercised, a testator who has effects in different places

may appoint different executors for these different places, whose office will then be confined to the goods within the limits to which they are appointed. Where appointments of this kind most frequently occur in practice, are, where a testator has property partly in this country and partly abroad, in which case it is often found expedient to appoint distinct executors or trustees, and divide their duties, so that the executors appointed for the management of the testator's goods in the one country may have nothing whatever to do with those appointed for another country: (Toller, 36; 4 Hagg. 408.) But a testator can, if he pleases, appoint distinct executors for his effects in different parts of the kingdom, whether it be in different counties (Swin. Part 4, s. 18, pl. 1; *Spratt* v. *Harris*, 4 Hagg. 408), in different dioceses, or in different provinces: (Wms. Exors. 219, 5th edit.)

As to conditional appointments.]—When the appointment is conditional, the condition may be either precedent; as, for example, to give security to pay the legacies, and in general to perform the will before he acts as executor (*Jennings* v. *Gower*, Cro. Eliz. 219); or subsequent, as in a case where a person is appointed executor, but with a proviso that his appointment is to become void if he fails to prove the will within three calendar months next after the death of the testator: (*In the goods of Day*, 7 Notes of Cases, 553; 2 Wms. Exors. 220, 2nd edit.)

As to substituted executors.]—A testator may appoint several persons as executors in several degrees; as where he constitutes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor, or if his son will not or cannot be executor, then he makes his brother, and so on (Swin. Part 4, s. 19; Godolph. Part 2, ch. 4, s. 1; Wms. Exors. 214, 5th edit.), in which case the wife is said to be instituted executor in the first degree, B. is said to be substituted in the second degree, C. to be substituted in the third degree, and so on. The substituted executor cannot propound the will until the first-named executor has been cited to accept or refuse the office: (*Smith* v. *Crofts*, 2 Cas. temp. Lee, 557.) And if an executor who is thus instituted once accepts the office, and afterwards dies intestate, the other substitutes, in what degree soever, are all excluded: (Swin. Part 4, s. 19, pl. 10; Wms. Exors. 215, 2nd edit.) But where a testator appoints an executor, and provides that another should be substituted in his stead in the case of his

death, the executor so substituted may, upon the death of the original executor, be admitted to the office, if it appears to have been the testator's intention that the substitution should take place on the death of the original executor, without reference as to whether that event was to take place in the testator's lifetime, or afterwards: (*In the goods of Lighton*, 1 Hagg. 235.)

In what manner the executorship may be made transmissible.] —An executor cannot assign the executorship (*Bedell* v. *Constable*, Vaugh. 182); but a testator may authorize his executors to appoint other persons as executors in the place of any one or more executors who shall happen to die, so that the full number of executors appointed by the will may be always kept up (see the form 2 Con. Prec., Part VII., No. XXIII., clause 11, p. 762, 2nd edit.); and such fresh executors, when so appointed, may act conjointly with the surviving or continuing executors, and have the same powers and privileges as if originally appointed to that office by the will: (*Jackson* v. *Paulett*, Rob. 344; Wms. Exors. 215, 2nd edit.) And although, as we have just before remarked, an executor, in the absence of an express authority, cannot assign the executorship, still the interest which he takes in that character under the will of the testator may be continued and kept alive by his own will; so that if there be a *sole* executor of A., the executor of such executor is to all intents and purposes the executor and representative of the first testator (25 Edw. 3, stat. 5, s. 5; 1 Leon. 275; Com. Dig. Administration, G. tit. Administrator, B. 6); and the rule is the same although the original probate was only a limited one: (*In the goods of Beer*, 2 Rob. 349.) But the law is otherwise with respect to administrators; for the administrator of an executor, or the executor of an administrator, has never been considered to be the representative of the original testator or intestate: (Bro. Abridg. Administrator, pl. 7; Com. Dig. Adm. B. 6; *Ley* v. *Anderson*, Sty. 225.) The reason of this distinction is, that the power of an executor is founded upon the special confidence and actual appointment of the deceased; and therefore such executor is allowed to transmit that power to another, in whom he reposes equal confidence; and so long as the chain of representation remains unbroken by any intestacy, the ultimate executor is the representative of every preceding testator; but the administrator of the executor is merely the officer of the ordinary commissioned to administer to the effects of such intestate executor, having no privity or relation to the

original testator, and therefore if such officer dies, it results back to the ordinary to appoint another: (2 Blac. Com. 506.) The only exception to the latter rule is in the case of an administrator *durante minore ætate* of the executor of an executor, who is in all respects the representative of the first testator, because an administrator so appointed stands *in loco executoris*: (*Anon.* 1 Freem. 287.)

Probate of the will essential to render the executorship transmissible.]—In order that the interest of an executor may be transmissible to his executors, it is requisite that he should prove the will; for if he should happen to die before probate, the executorship will not be transmissible to his executor, but is wholly determined, and an administrator *cum testamento annexo* must be appointed: (*Pullen* v. *Serjeant*, 2 Chan. Rep. 300.)

How executorship is transmissible amongst surviving executors.]—And where there are several executors, and one of them dies, leaving one or more executors living, the whole executorship will pass over to the survivors, and be transmitted ultimately to the executor of the last surviving executor, unless he happens to die intestate, in which latter case administration *de bonis non* will become necessary: (Went. Off. Exors. 215, 14th edit.; 2 Wms. Exors. 224, 5th edit.; *In the goods of Smith*, Curt. 31.) And where there are several executors, and one alone proves the will, and the rest renounce before the ordinary, still his interest will not be transmissible to his executor, if any of the renouncing executors should happen to survive him: (*Arnold* v. *Blancowe*, 1 Cox, 426.)

Not material in what part of the will the appointment of executors is made.]—It is not material in what part of the will the appointment of the executors is made, but the regular course is to make such appointment either at the commencement, or at the very end of the will, although the latter place is the one most usually adopted: (see the form 2 Con. Prec., Part VII., No. I., clause 12, p. 639, 2nd edit., *id. ib.* No. VI., clause 24, p. 660; *id. ib.* No. VIII., clause 8, p. 665; *id. ib.* No. XVII., clause 7, p. 719.)

Practical suggestions for penning the appointment of executors.]—The appointment should be made in plain terms, and if qualified or limited in any respect, it should be done in the plainest language possible, so as, if possible, to prevent

questions from being raised at any future time as to its construction. And whenever the executors take any beneficial interest under the will, the testator's intention to that effect should be declared in express terms; and it is important that a testator's attention should be directed to this subject; as many persons, notwithstanding the law has been for many years altered in this respect, still suppose that the mere appointment of a person as executor will give him a beneficial interest in the whole of the testator's personal estate which is not actually disposed of by the will, instead of making him, as he now will be, a mere trustee as to such property for the next of kin.

Where executors are also legatees under the will.]—Whenever also legacies are given to trustees or executors, it will be advisable to state whether such legacies are so given as a compensation for their trouble in discharging the duties of their office, or otherwise, for the purpose of preventing any questions or disputes from being afterwards raised, in case they should renounce or become incapable to exercise the office, as to whether or not they should still be entitled to claim their legacies (*Compton* v. *Blachar*, 2 Coll. 201); for, although the general rule appears to be against such claim, it is always the safest plan, by a plain and explicit statement, to remove all doubt whatever upon the subject: (see the form 2 Con. Prec., Part VII., No. XXII., clause 28, p. 749, 2nd edit.)

CHAPTER XI.

TESTAMENTARY APPOINTMENT OF GUARDIANS.

No person by the common law was authorized to appoint a guardian.]—No person by the common law was authorized to appoint a guardian for a child, either in chivalry, or in socage, such guardians being appointed by the law itself. But with regard to daughters, after the passing of the act 4 & 5 Philip and Mary, c. 8, the father, upon the construction of that statute, was empowered by deed or will to assign the guardian to any woman child under the age of sixteen years, and if none was so assigned, the mother, in such case, was to be the guardian.

Statute 4 & 5 Philip and Mary.]—This statute of the 4 & 5 of Philip and Mary enacts, under severe penalties, as fine and imprisonment, "that nobody shall take away any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession, custody or governance, and against the will of such father of any such maid or woman child, or of such person to whom the father of such maid or woman child, by his last will and testament, or by any other act in his lifetime, hath appointed, or shall appoint, assign, bequeath, give or grant the order, keeping, education and governance of such maid or woman child."

Object of the statute 4 & 5 Philip and Mary.]—The direct object of the above statute was to prevent the taking away or marrying of maidens under the age of sixteen years against the consent of their parents; still, the statute has prohibited it in terms which imply that the custody and education of such females should belong to the father or mother, or person appointed by the former. It is also remarkable that under this act, although the title is confined to maidens being inheritors, and the preamble speaks only

of such as be heirs apparent, or have real or personal estate, yet the enacting clause mentions maidens under sixteen generally. It has also been held to include illegitimate, as well as legitimate children; and the Court of B. R. has granted an information against parties for taking away a natural daughter under the age of sixteen from the custody of her putative father, being of opinion that the case came within the meaning of the third section of the above-mentioned statute: (*Rex* v. *Corneforth*, State Trials, 1162.)

Statute 12 *Car.* 2, *c.* 24.]—The statute of Philip and Mary applied only to female children; but by a subsequent enactment (statute 12 Car. 2, c. 24), "where any person shall have any child or children, under the age of twenty-one years, and not married at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time *in ventre sa mere*, or whether such father be within the age of twenty-one years, or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall think fit, to dispose of the custody of such child or children during such time as he or they respectively shall remain under the age of twenty-one years, or for any lesser time, to any person or persons in possession or remainder, other than popish recusants; and such person to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward, or trespass against any person who shall wrongfully take away or detain any such child, and recover damages for the same in the same action for the use and benefit of such child. And such person to whom the custody of such child shall be so disposed or devised, may take into his custody, to the use of such child, the profits of the lands, tenements and hereditaments of such child, and also the custody, tuition and management of the goods, chattels, and personal estate of such child till his, her, or their age of twenty-one years, or any lesser time, according to such disposition as aforesaid, and may bring actions in relation thereto, as by common law a guardian in socage may do:" (sect. 8.)

If father fails to appoint a guardian, Court of Chancery is authorized to appoint one.]—Before the passing of last-mentioned statute (12 Car. 2, c. 24), guardians for real estate were under the directions of the Court of Ward and Liveries, which being taken away by this statute, power is

given by the same statute to the father, by his deed or will, to appoint a guardian, which if he fails to do, or the guardians appointed by him refuse to act in the office, the power then devolves upon the High Court of Chancery, the Lord Chancellor, under the Crown, being the supreme guardian of all infants and others not capable of acting for themselves.

Father only is empowered to appoint guardians.]—The father, and he only, is empowered to appoint a guardian; consequently, an attempt by a mother to make such an appointment, although then a widow (*Ex parte Edwards*, 3 Atk. 59), or by a grandfather, is a mere nullity. Neither can a guardian appointed by the father appoint another person as guardian in his stead; for the guardianship under the statute of 12 Car. 2, c. 24, is a personal trust, and, like the guardianship in socage, not assignable: (*Bedell* v. *Constable*, Vaugh. 179.) Neither can a putative father appoint a guardian to his illegitimate child under this statute. But although not strictly authorized to make such an appointment, he may in reality attain the same object by naming certain persons as guardians of his illegitimate children, which, although insufficient alone to constitute them such, the court has carried into effect by appointing the same persons to the office: (*Ward* v. *St. Paul*, 2 Bro. C. C. 583.)

Operation of statute 1 *Vict. c.* 26, *upon the testamentary appointment of guardians.*]—Under the statute of 12 Car. 2, c. 24, a minor as well as a person of full age was empowered to make an appointment of guardians either by deed or will; but the statute 1 Vict. c. 26, has deprived him of this power so far as relates to an appointment made by will, which, since that act came into operation, no person is now authorized to make who has not attained the full age of twenty-one years: (sect. 7.) But it seems the power for a minor to appoint a guardian by deed still remains in force.

Guardianship cannot be extended beyond the period of the ward's minority.]—The period of guardianship cannot be made to extend beyond the minority of the ward; as the statute (12 Car. 2, c. 24) only empowers the father to appoint a guardian until the infant shall be of the age of twenty-one years (*Oxenden* v. *Lord Compton*, 4 Bro. C. C. 231); but the marriage of an infant under the age of twenty-one years will not dissolve the guardianship: (3 Atk. 625.)

What persons may be appointed guardians.]—The act

authorizes the appointment of any persons to the guardianship, except popish recusants; and an appointment of a guardian under this act was held to be well executed, although the guardian thereby appointed was one of the attesting witnesses to the will. And the Master of the Rolls observed—"There is no argument urged in this case with reference to the credibility of the attesting witness which does not apply to the attestation of wills. An executor or a legatee is a good witness in the latter case, which, though it is true the late statute has taken away any beneficial interest of a legatee who is a witness, I see no reason why the person appointed a guardian should be held not to be a credible witness to the execution of the appointment within the statute. Reason, principle, and authority all lean the other way. I am of opinion that a guardian is a good witness:" (*Morgan* v. *Hatchell*, 24 L. T. Rep. 167.)

Guardian viewed in the light of a trustee.]—In a late case (*Mathew* v. *Brise*, 17 L. T. Rep. 190), an important question was raised, as to whether a testamentary guardian appointed under the provisions of the above-mentioned statute was a trustee, so as to let in against him the rule of law that excludes the operation of the Statute of Limitations as between a trustee and the *cestui que trust*, when it was decided that he was a trustee, and consequently was disabled from setting up that statute in bar to a bill for an account.

CHAPTER XII.

CODICILS.

THE term codicil, or *codicillus*, is, as we have already noticed, used as a diminutive of *codex*, a will, or testament (Godolph, Part I., Ch. VI., s. 1); and, in its modern acceptation, signifies an instrument made by a testator, and annexed to, and to be taken as part of his will, either to alter, restrain, add, or subtract something from it (Swin. 1, Part 1, s. 5, pl. 5), the will and codicil together making but one testament: (*Huntley* v. *Tribbes*, 16 Beav. 510.) And in this respect it will make no difference whether one codicil, or several codicils are annexed to the will.

Will and codicil how differing from each other in their operation.]—The chief difference between a will and a codicil in their respective operations is, that a latter will is a total revocation of a disposition varied therein from what it was in a former will, although no express words of revocation be contained in such latter instrument; but a codicil is no revocation of a will, or of any of its dispositions, further than that it is specifically altered thereby, unless it contains words of express revocation; a codicil, therefore, is no revocation, even of a particular disposition in a preceding will to which it is applicable, except precisely in the degree expressed, leaving the particular dispositions unaffected thereby, as well as the instrument in all other respects, precisely in the state it finds them: (*Willet* v. *Sandford*, 1 Ves. 178.)

As to the construction of codicils with relation to each other where there are several instruments.]—As the will and codicils together are considered to make but one testament, questions have frequently arisen as to whether the language of the codicils refers to the whole testament, including the

will and all the codicils, or relates to some one or more of these instruments only, or to persons mentioned in some one or more only of such instruments. In *Sherar* v. *Bishop* (4 Bro. C. C. 55), a testator gave the residue of his personal estate amongst such of his relations only *as were mentioned in that his will;* he afterwards made a codicil, which he directed to be taken as part of his will; and then a second codicil, by which he gave legacies to two of his relations, but gave no such direction; and it was held by Lord Commissioner Eyre (*dubitantibus* Ashurst, J., and Wilson, J.), that as every codicil was a part of the testamentary disposition, though not part of the instrument, the relations named in the second codicil were entitled to a share of the residue. This decision has, however, been considered as carrying the principle rather too far (Wms. Exors. 8, note (*s*)); and in a more recent case (*Hall* v. *Severne*, 9 Sim. 515, 518), Shadwell, V. C., said he could not accede to it. In the case last referred to, a testator gave by his will pecuniary legacies to several persons, and directed his residue to be divided amongst his before-mentioned legatees, in proportion to their several legacies thereinbefore given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees, in addition to what he had given to them, or any of them, by his will. And the Vice-Chancellor held that none of the legatees under the codicil were entitled to share in the residue in respect to the legacies. In an earlier case, also (*Fuller* v. *Hooper*, 2 Ves. sen. 242), where a person by will gave legacies to all her nephews and nieces, *except those thereinafter named*, and desired her executors to look upon all *memoranda* in her handwriting as parts of or a codicil to her will; and then bequeathed the residue to the children of her sisters; and by a codicil she gave legacies to some other nephews and nieces; Lord Hardwicke held that the nephews and nieces mentioned in the subsequent part of the will, and not those mentioned in the codicil, were excluded from the first-mentioned legacies; because the testatrix meant to refer, not to her testament, which takes in all the parts, but to the particular instrument. And in the more recent case of *Early* v. *Benbow* (2 Coll. 354), where a testator, by his will, directed that the legacies "hereinbefore by me bequeathed," should be free of legacy duty; and, by a codicil which he directed should be taken as part of his will, he gave other legacies: Knight

Bruce, V. C., held that the legacies given by codicil were not given free of legacy duty, his honour being of opinion that the word "*herein*" was meant to refer to no more than the particular instrument in which it was contained.

How a codicil should be penned generally.]—A codicil may be either written on the same paper as the will, or affixed to or folded up with the will, or it may be written on a different paper, and deposited in a different place (2 Blac. Com. 500; Swin. Part 1, s. 5; Toll. Exors. 4); but whether it be attached to the will, or contained in a separate paper, it should always refer to the will, and declare that it is a codicil thereto, and intended to form part of it. In referring to the will it will be proper to set out the date of that instrument, for the purpose of identifying it as the particular will to which the codicil is intended to be annexed (see the form 3 Con. Prec., Part VII., No. LIII., clause 1, p. 56, 2nd edit.); and whatever the codicil is intended to alter, restrain, add to or subtract from the will, should be set out in the clearest terms, and it should conclude by confirming the will in all other respects, except so far as it is altered by such codicil: (*id. ib.*)

As to substituted and additional bequests.]—If any bequest contained in a will is intended to be revoked, and another substituted in its stead; or where a bequest has been made by a will, and an additional gift is intended to be made to the same party by a codicil annexed to and forming part of such will, the latter instrument ought to state in express terms whether the bequest contained in the codicil is to be considered as a substituted, or a cumulative gift, and thus, if possible, prevent any doubt or question from being raised upon the subject at any future period.

Practical suggestions.]—The best plan of doing this, where the bequest is intended to be merely substitutional, is to recite the gift in the will, and then revoke the bequest in express terms, and bequeath the substituted gift to the legatee in its stead, all of which may be penned in a very concise form: (see the form 3 Con. Prec., Part VII., No. LV., clauses 1, 4, 5, and 6, pp. 53, 54, 2nd edit.) And where the bequest is to be additional or cumulative, the original gift ought to be recited, and then the additional gift should be bequeathed; and, at the same time, it should be stated that the latter is to be in addition to the former bequest: (see the form *id. ib.* clause 3, p. 53.)

General rules of construction.]—In the absence of some expressions denoting a contrary intent, it appears that where *the same specific* thing is bequeathed twice to the same legatee, whether such bequests be contained in the same will, or in a will and a codicil thereunto annexed, the legatee will, in either case, be entitled to a single gift only, and not to both: (Swin. Part 7, s. 20; *Holford* v. *Wood*, 4 Ves. 79, 91.) In this respect there is a difference between the bequest of a specific chattel, and of legacies of quantity; for although, where two legacies of quantity of the same amount are given to the same legatee in one and the same instrument, the second bequest will be considered a mere repetition, and entitle him to one legacy only (Swin. Part 7, s. 21, pl. 13; *Manning* v. *Thessiger*, 3 Myl. & Kee. 29), yet this rule only holds where both legacies are given by the same instrument, for if given by distinct instruments (and for this purpose a will and codicil are so considered, although both written on the same paper) (see 2 Wms. Exors. 1161, 5th edit., and the several cases there referred to), the presumption is, that the latter is cumulative, and, consequently, that the legatee will be entitled to both gifts, without any reference as to whether the amount be equal or unequal to the former gift: (*Russell* v. *Dickson*, 2 Dru. & Warr. 133, 137.) And whenever legacies of quantity are of unequal value (*Currie* v. *Pile*, 2 Bro. C. C. 225), or if they are given for different causes, or if they are to be paid out of different funds, as where one is to be paid out of the real, and the other out of the personal estate (*Peacock* v. *Talcour*, 1 Bro. C. C. 295); or where one is given as a pecuniary legacy, and the other by way of annuity (*Masters* v. *Masters*, 1 P. Wms. 421); or if one be absolute, and the other contingent, or subject to a condition (*Hodges* v. *Peacock*, 7 Ves. 737); or if the legacies differ in the time and mode of payment, the two bequests will not be merged in each other, but the legatee will be entitled to both, whether the two bequests be both contained in the same instrument, or in distinct and separate instruments: (*Yockney* v. *Hansard*, 6 Hare, 620, 622.)

What will afford sufficient intrinsic evidence to show the testator's intent that the gifts should be substitutional and not cumulative.]—The context of the will or codicil may, however, afford sufficient intrinsic evidence to show that the testator's intent was that the gifts should not be cumulative but substitutional, and, consequently, that the latter gift was merely intended in the stead of the former one

bequeathed by the prior instrument (*Martin* v. *Drinkwater*, 2 Beav. 215); as, where a latter codicil is a mere copy of a former one, with the addition of one single legacy (*Coote* v. *Boyd*, 2 Bro. C. C. 521); or where it is manifest that the latter instrument was made for the purpose of better ascertaining the legacies bequeathed by the former one: (*Sawrey* v. *Rumney*, 5 De G. & Sm. 698.) And if a testator declares one gift to be in addition to another, and in another instance makes a gift without any such declaration, this will afford a circumstance to show that the latter was not intended to be additional, but merely substitutional: (*Russell* v. *Dickson*, 2 Dru. & Warr. 139.)

Legacies of the same amount both given for the same motive will raise a presumption that the testator did not intend the legacies to be cumulative.]—And if legacies of the same amount are given by two distinct instruments, both of which express the same motive for the gift, these two coincidences will raise a presumption that the testator did not intend to bestow a second gift by the codicil, but meant only a repetition of his former gift: (*Benyon* v. *Benyon*, 17 Ves. 34.) But this presumption will only arise where the double coincidence occurs of the same motive, and the same sum in both the instruments (*Mackinnon* v. *Peach*, 2 Kee. 555); consequently, unless the same motive and the same sums be expressed in both instruments, the legatee will be entitled to both the gifts: (*Lord* v. *Sutcliffe*, 2 Sim. 273.) The motive also must be expressed, and will not, it seems, be inferred from any character the legatee may fill with relation to the testator; hence, where a testatrix gave an annuity "to my servant E. H.," and, by a codicil, an annuity of the same amount "to my servant E. H.," the bequests were held to be cumulative, the word "servant," not expressing *the motive*, but being descriptive only: (*Hurst* v. *Beach*, 5 Mad. 358; *Rock* v. *Callen*, 6 Hare, 531.)

Substituted or additional legacies are generally subject to all the incidents of the original bequest.]—It may be laid down as a general rule, that where a legacy is given as a mere *substitution* for another, the substituted gift is subject to precisely the same incidents as the original one, without any reference as to whether it is so expressed or not in the testamentary instrument (*Day* v. *Croft*, 10 Beav. 561); and, in like manner, additional bequests are, generally speaking, subject to the same conditions and incidents as the original gift to which they are added: (*Cooper* v. *Day*,

sup.) Still, this rule is not so universal with respect to bequests of the latter kind as in the case of substituted gifts: (*In re More's Trust*, 10 Hare, 171.)

Where one devisee or legatee is to be substituted in the place of another.]—Where a codicil is intended to substitute one devisee or legatee in the place of another person named in some prior will or codicil, the devise or bequest in such prior will or codicil should be recited, as also the nature of it, as also the name of the devisee; and the prior devise of bequest should then be revoked, and the substituted gift bequeathed to the substituted party: (see the form 3 Con. Prec., Part VII., No. L., clauses 3 and 4, p. 52, 2nd edit.; *id. ib.* No. LV., clause 2, p. 53; *id. ib.* No. LVI., clauses 1 to 4 inclusive, pp. 55, 56.)

As to the substitution of parties in case of lapsed gifts.]—Where it is intended to substitute other persons in the place of any one whose gift has lapsed by his death in the testator's lifetime, it will be proper, after setting out the original bequest, to recite the death of the party which caused the bequest to lapse, and then bequeath such lapsed gift to the person substituted: (see the form 3 Con. Prec., Part VII., No. LVII., clauses 1 to 3 inclusive, pp. 57, 58, 2nd edit.)

Where the codicil is made simply for the purpose of changing trustees or executors.]—If a codicil is made for the simple purpose only of appointing, or changing trustees or executors in the stead of those appointed by the will, the will itself should be recited, and the appointment of the original trustees or executors briefly set out, as also the reason for the change or new appointment, such as the death, unwillingness to act, &c., or the desire of the testator to appoint new trustees or executors in the place of the old ones, or otherwise as the case may be; and if the substitution is to be made for any other cause than the death of one or more of the parties, it will be proper to revoke the appointment so far as the trustees or executors who are to be displaced are concerned, and then to substitute the new trustees in the stead of such deceased or displaced parties; to which should be added a declaration that the will shall be read and construed, so as to have the same effect and operation in every respect as if the names of new trustees or executors had been originally inserted therein, instead of the original trustees or executors therein named and appointed

in every part of the will in which the names of the latter shall occur, concluding with the usual clause confirming the will in every other respect: (see the form 3 Con. Prec., Part VII., No. LXII., clauses 1 and 2, p. 68, 2nd edit.)

Same conditions may be annexed to gifts contained in a codicil, as in the original will.]—The same conditions or restrictions may be annexed to a devise or bequest contained in a codicil as in an original will, and a testator may also, if he pleases, annex a condition to a devise or bequest which in the will was given absolutely. This has most frequently been done where a testator, subsequently to making his will, has any grounds for supposing that any of the persons named therein may set up any claims adverse to any of the dispositions of the will, so as to put the parties to their election to give up their adverse claims or renounce all benefit under the will.

The subject of the revocation and republication of wills by codicil will be more fully entered upon and discussed in a subsequent chapter.

CHAPTER XIII.

OF THE EXECUTION AND ATTESTATION OF WILLS.

THE only solemnity required by the Statute of Wills (32 Hen. 8, c. 1) was that the instrument should be in writing, upon the construction of which it has been held that a letter written by a man whilst at sea, in which he mentioned that his lands should go as therein directed, was a good and valid will: (*West's case*, Moore, 177.) Neither was it necessary that such writing should have been in the testator's own handwriting, or even signed by him; so that mere notes taken by a third party from the testator's instructions, for the purpose of being reduced into form, were holden to constitute an effectual will, notwithstanding the testator's name was not mentioned in any part of it: (*Sir Francis Worsley's case*, 1 Sid. 315; S. C. 2 Keb. 132; pl. 82, *sub nom. Stevens* v. *Jerrard.*)

Operation of the Statute of Frauds upon devises of real estate.]—The Statute of Frauds (29 Car. 2, c. 3), however, introduced some stricter rules with respect to wills of real estate, by the fifth section of which it is enacted, "that all devises of any lands or tenements devisable either by force of the Statute of Wills, or by this statute, or by the custom of any borough, or of any particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

As to the testator's signature.]—Although the Statute of Frauds required the will to be signed by the testator, it did not require him to sign in the presence of the witnesses, provided he acknowledged to them that it was his hand-

writing: (*Dormer* v. *Thurland*, 2 P. Wms. 506; *Tollett's case*, Mos. 46; *Moodie* v. *Reed*, 1 Mad. 516.) Neither was it in any way material in what part of the will the testator's name appeared, if it could have been shown that he himself actually placed it there. As, where a testator commenced his will thus, "I, John Stanley, do hereby, &c.," which was held to be a sufficient signing within the statute: (*Lemayne* v. *Stanley*, 3 Lev. 1; see also *Cook* v. *Parsons*, Pre. Cha. 192; *Smith* v. *Codron*, cited 2 Ves. sen. 455; *Stonehouse* v. *Evelyn*, 3 P. Wms. 252; *Grayson* v. *Atkinson*, 2 Ves. sen. 454; *Addey* v. *Grie*, 8 Ves. 504.) But by the Wills Act (1 Vict. c. 26) the testator's signature is required to be placed at the foot or end of the will, and to be made or acknowledged by him before the witnesses: (sect. 9.) Whenever, therefore, a will is to be executed, care must be taken that these requisitions are duly complied with; for in a rather recent case, where the attesting witnesses to a will deposed that the testator did not sign the will in their presence, nor did they see any signature when they subscribed their names, it was held that the will was not duly executed under the ninth section of that act: (*Shaw* v. *Neville*, 24 L. T. Rep. 339.)

Stamping whether a sufficient signature.]—A signature by a mark or stamp was holden to be a sufficient signature under the Statute of Frauds (*Harrison* v. *Harrison*, 8 Ves. 185; *Saunderson* v. *Jackson*, 2 Bos. & Pull. 239; *Wright* v. *Wakeford*, 7 Ves. 558; *Taylor* v. *Dennings*, 3 Per.), and will also be considered a valid signature within the act 1 Vict. c. 26: (*In re Bryce*, 2 Curt. 325.) But affixing a seal is not a sufficient signature within the meaning of either of those statutes; for those enactments requiring a will to be signed undoubtedly meant some evidence to arise from the handwriting, which could never arise out of a seal, as so many common seals are alike that no certainty or guide could possibly be gained from this; added to which, when an act of Parliament mentions signing, it means something different from sealing. And in a still more recent case (*In the goods of John Simmers*, Prerog. Court, 11 May, 1850), the mere fact of placing a seal by the side of a signature previously written, that signature not having been written by the person whose name it represented, with the use of the words "I deliver this as my act and deed," was held to be an insufficient acknowledgment of a signature to a will under the ninth section of the Wills Act: (1 Vict. c. 26; *Shaw* v. *Neville*, 24 L. T. Rep. 413.)

Signature, if made by testator's direction, will suffice.]—Still, it is not actually necessary that the signature should be made by the testator himself and none other; for it may be done either by himself, or by any other person in his presence, and by his direction, and such signature may be made as well by either of the two attesting witnesses as by any other person: (*Re Bailey*, 1 Curt. 914; *Smith* v. *Harris*, 1 Rob. 262.)

Important alterations effected by Wills Act (1 *Vict. c.* 26), *with respect to the signature to wills.*]—An important alteration has also been made by the Wills Act, 1 Vict. c. 26, with respect to the place of signature; for instead, as under the Statute of Wills, of permitting its insertion in any part of the instrument, it expressly requires that the signature should be at the foot or end. Upon this some questions have lately arisen as to what, strictly speaking, may be construed as the foot or end, within the meaning of this clause of the act. The question seems to have been first mooted in the case of *Smee* v. *Bryer*, 10 L. T. Rep. 380. In that case a will, signed by the testatrix writing her name on the fourth page of a sheet of paper on which the will was written, the signature being opposite the attestation clause, beneath which were the names of the witnesses, no part of the will being on the fourth page, was held to be an insufficient signature at the "foot or end," within the meaning of the statute 1 Vict. c. 26, s. 9. The rigid construction put on the words "foot or end" in the above-mentioned case, rendered it advisable in *Re William Harris* (reported 13 L. T. Rep. 10), to take the opinion of the court as to whether a will signed by the testator after the attestation clause was or was not a sufficient signature; and it was held to be signed at the foot or end. In *Re Howell* (2 Curt. 342), below the signature of the testator and of the witnesses, but before the execution was written the clause appointing the executors, and the latter clause was rejected, and administration with the will annexed allowed to pass to the residuary legatees. In another case, where the testator signed his name at the bottom of a printed form ending on the second side of a sheet of paper, the will itself ending on the first side, probate was allowed to pass as a will signed at the "foot or end" thereof: (*In re Carver*, 3 Curt. 293.) In *Re Hallings* (13 L. T. Rep. 308), also, the will of a blind woman was held to be valid, although the will was contained in the first two pages of a sheet of paper, and the signature was half way down the third page, followed, however, by

the attestation clause and the names of the witnesses. *In the goods of James McCullum* also (3rd July, 1849), probate was granted of a will although the signature was in the margin, and, therefore, not strictly at the "foot or end," as mentioned in the statute. Again, in *Re M. Beadley*, a will was written on both sides of a sheet of paper, and on part of a third side. At the end of the will itself there was a blank space of about half a line, the words one thousand eight hundred and forty-eight forming the first line. Immediately below those words was an attestation clause, which extended from one side to the other wholly across the paper. About three inches below the last line of the attestation clause was the signature of the testatrix. Opposite to the signature was the word "witnesses." The name of the testatrix was followed immediately by the names of the two attesting witnesses; the consequence of which was, that the signature of the testatrix was at the distance of three inches below the attestation clause, and, consequently, was not, strictly speaking, at the foot or end of the will; but Sir H. J. Fust held that the will was properly executed. And in a recent case, before the Court of Delegates, in Ireland (*Derinzey* v. *Turner*, 17 L. T. Rep. 271), a will was written on both sides of a sheet of paper, and came down to within about two inches from the bottom of the second page, which space was left blank; and then, at the top of the third page, the attestation clause was written, beside which the signature of the testatrix was affixed, and immediately under the signature of the witnesses. It was admitted that the testatrix was nearly blind, and required more room than an ordinary person. It was held that this was a due execution of the will by the testatrix within the provisions of the Wills Act (1 Vict. c. 26), which requires a will to be signed at the end or foot thereof.

Inconveniences caused upon the construction of the act 1 *Vict. c.* 26, *with respect to blanks, and to the position of the testator's name.*]—The Wills Act (1 Vict. c. 26), having made no provision whatever respecting cases where blank spaces have been left in the body of a will as originally prepared, many new and difficult questions arose as to the propriety of admitting such a will at all, or at least of the filled up space to probate: (*Birch* v. *Birch*, 12 L. T. Rep. 334; *Gomely* v. *Gibbons*, 13 L. T. Rep. 271.) And so many serious evils were found to arise, not only from this cause, but also from the questions that were continually arising as to the proper position in the will the testator's name must occupy, that it

was at length considered expedient to pass an act of Parliament for the purpose of removing them. This was effected by the act 15 Vict. c. 24, which, after reciting that the laws with respect to the execution of wills required further amendment, proceeds to enact as follows:

1 *Vict. c.* 26.]—"1. Where by an act passed in the first year of Her Majesty Queen Victoria, intituled, *An Act for the Amendment of the Laws with respect to Wills*, it is enacted that no will shall be valid, unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect to such his signature by his writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately at the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow, or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside the names of one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act, or this act, shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

Act to extend to certain wills already made.]—The provi-

sions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction, in consequence of the defective execution of such will, or where the property not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto, in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will by a court of competent jurisdiction, in consequence of the defective execution of such will.

Interpretation of the will.]—The word will shall, in the construction of this act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of Her Majesty Queen Victoria.

As to attestation and subscription of the attesting witnesses.]—The Statute of Frands (29 Car. 2, c. 3), notwithstanding that it required that the three witnesses should sign the will, did not require that all the witnesses should be present at the same time: (*Cook* v. *Parsons*, Pre. Cha. 184.) In one case four years elapsed from the time the testator executed his will, in the presence of two witnesses, before it was witnessed by the third, and yet the will was held to have been properly attested: (*Jones* v. *Luke*, 2 Atk. 177, cited; so also *Carlton* v. *Griffin*, 1 Bur. 549.) But it was essential that all the witnesses should have witnessed and subscribed their names as witnesses to the same instrument; for where two witnesses attested a will, and a third witness attested a codicil made afterwards, it was considered insufficient: (*Lee* v. *Libb*, Carth. 292; S. C. 1 Show. 68; 3 Mod. 292.)

Signature and acknowledgment by the testator how far essential.]—The Statute of Frauds (29 Car. 2, c. 3) did not require that the attesting witnesses should see the testator sign his name to the will, or even be made acquainted with the nature of the instrument they attested: (*British Museum* v. *White*, 3 Moo. & Pay. 682; *Wright* v. *Wright*, 5 *ib.* 316; *Johnson* v. *Johnson*, 1 Cr. & Mee. 140.) But the act 1 Vict. c. 26, requires that the signature should be made and acknowledged by the testator in the witnesses' presence, and that both the witnesses should be present at the same time

(sect. 9); still, any will so executed will be valid, without any further publication thereof. With respect to what will be considered a sufficient signature and acknowledgement within the meaning of this act, it seems, as we have just before noticed, that the will may be signed by a third party by the testator's direction, which will be quite as effectual as if the testator had written his name with his own hand; for a party signing by a testator's direction is as much his instrument as a pen in his hand would have been.

Whether a subsequent recognition of signature by testator will suffice.]—As the testator's signature may be either made or acknowledged by him in the witnesses' presence, a recognition or acknowledgment of his signature by him in the presence of the witnesses will be sufficient without his again going through the form of signing his name. But such acknowledgment of the signature must be made before the witnesses sign, for if made afterwards it will be insufficient (*Re Olding*, 2 Curt. 865; *Re Bird*, 3 *ib.* 117; *Cooper* v. *Beckett*, *id. ib.* 643); and in the case last referred to, Sir H. J. Fust observed, that the act expressly requires that the deceased shall have signed the will, or acknowledged his signature in the presence of two witnesses present at the same time, and that it was essential they should have attested it in the presence of the testator, though not of each other. The interpretation which the court has put upon the section is that the testator must sign or acknowledge his signature before the witnesses attest, and if the witnesses attest before the signature of the deceased is fixed to the will, the will is not executed within the provisions of the act. The words of the section are very precise, and it would be attended with dangerous consequences if the court were to hold a will valid which had been signed in the presence of two witnesses who have attested it before the signature of the testator was attached to the will; for where is the court to draw the line? Suppose the witnesses attested an hour before the testator signed, or a day, or a week, or any other time, where is the court to stop if it gives a latitude of construction to this section of the act?

Whether it is essential that the witnesses should see the testator's signature.]—It is also essential that the witnesses should see the testator's signature, otherwise it will be no signature within the meaning of the statute. Hence, where a testator requested two persons at the same time to sign

a paper for him, which they did in his presence, but the paper itself was folded up in such a way that the witnesses did not see any writing whatever upon it, and this was held to be an insufficient signatare or acknowledgment of signature within the meaning of the act; for it is the signature, not the will, which the act requires to be acknowledged; and it is impossible that such an acknowledgment can be made unless the signature itself be exhibited to the witnesses: (*Ibott* v. *Genge*, 3 Curt. 160; and see *Re Harrison*, 2 *ib.* 863; *Hudson* v. *Parker*, 1 Rob. 14.) But if the will is produced with the testator's signature to it, which the testator requests the witnesses to attest, and they then attest and subscribe the will in his presence, this will be a sufficient signature and acknowledgment by the testator and attestation by the witnesses within the meaning of the act: (*Re Adridge*, 12 L. T. Rep. 351; *Burgoyne* v. *Showler*, 1 Rob. 51; see also *Re Regan*, 1 Curt. 908; *Gaze* v. *Gaze*, 3 *ib.* 451.)

As to the form of attestation.]—The act 1 Vict. c. 26, does not require any particular form of attestation; but if the fact of the witnesses being all present at the same time does not appear in the attestation clause, the Prerogative Court will require an affidavit that the will was so executed before they will grant probate. To prevent this consequence, the proper way will be to pen the clause in the following terms:

"Signed, sealed, published and declared by the within-named (*testator's name*), the testator, as his last and only will and testament, in the presence of us, who, present at the same time in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses."

As to the signature by the witnesses.]—It is necessary that the witnesses themselves should actually sign their names; for, although a testator may direct another to sign his name for him, the witnesses have no such authority conferred upon them. Hence, where the signatures of the attesting witnesses were made by another person, they holding the top of the pen at the time their names were written, and no reason given why they did not sign themselves, though able to do so, the signature was holden to be insufficient: (*In the goods of Thomas Kelcher*, 10 L. T. Rep. 482.) And where a witness to a will traced his name previously written with a dry pen, it was held that this did not amount to such a subscription as the act required: (*Re Clark*, 2 Curt. 329.) But making

a mark is a sufficient signing for the purpose of attestation: (*Re Ashmore*, 3 Curt. 320.)

How the will should be signed and attested where it consists of several sheets of paper.]—If the will consists of several sheets of paper, the regular practice is for the testator to sign his name to each sheet, which should also be subscribed by the witnesses, and this should be noticed in the testimonium clause of the will; for, although this is not essential to the validity of the instrument, it has the effect of showing the identity of each page so signed and attested, as forming part of the will executed by the testator. Sealing is in no way necessary, though it is a common practice to affix a seal opposite the signature of the testator's name in the last sheet of the will.

As to the date of the will.]—The date of the will is usually inserted at the very end of the testimonium clause, and ought never to be omitted; for although by no means essential to the validity of the will, it will afford evidence of the time at which it was executed, in case another will or testamentary writing should also be found, so as to show which of them is to supersede the other; for if it should so happen that two wills should be discovered, neither of them bearing any date, and it could not be shown by extrinsic evidence which was the last executed, both must be void for uncertainty: (*Phipps* v. *Earl of Anglesea*, 7 Bro. P. C. edit. Toml. 443.)

Where the will contains any alterations or erasures.]—If the will contains any alterations or erasures it will be proper to direct the witnesses' attention to the particular parts of the will in which such alterations or erasures occur, and get them to place their initials in the margin opposite before the will is executed, and to notice this having been done by a memorandum added to the attestation clause at the end of the will. This may be done to the following effect, to be varied, of course, according to circumstances:

"The interlineation of the word 'my,' between the twenty-fifth and twenty-sixth lines from the top of the first sheet, and the word 'their' written on an erasure in the thirty-first line of the same sheet, and against which we, as well as the said testator, have placed the initials of our names, having been first made; and the word 'Edward,' written on an erasure on the twelfth line of the said first sheet, and against which we have also placed our initials, having been first made."

What will be considered a sufficient subscription by the

witnesses in the testator's presence.]—Both the Statute of Frauds, 29 Car. 2, c. 3, and the statute 1 Vict. c. 26, require the attestation and subscription to the will by the attesting witnesses to be made in the testator's presence; but what is to be considered as the testator's presence has often proved a very puzzling question. In one case, where a testator desired the witnesses to go into another room seven yards distant, in which there was a broken window, through which he might have seen them, this was holden to be a sufficient signature in the testator's presence within the Statute of Frauds (*Sheers* v. *Glasscock*, 1 Eq. Cas. Abr. 403, pl. 8; S. C. 2 Salk. 688); for that it was not necessary the testator should actually see the witnesses subscribe their names; it was enough if he was in such a situation that he might have seen them if he would. And, upon the same principle, the signature would have been equally valid under the statute 1 Vict. c. 26. In another case also, where a testator sate in her carriage opposite the windows of her attorney's office in such a position that she might, if she had pleased, have seen the witnesses who there subscribed their names as attesting witnesses to her will, which they had before seen her execute, it was held to be a sufficient subscription in her presence: (*Casson* v. *Dade*, 1 Bro. C. C. 99.) And in a case which arose since the Wills Act (1 Vict. c. 26) came into operation (*Newton* v. *Clarke*, 2 Curt. 230), a testator signed a codicil whilst lying in bed, the two witnesses who attested the codicil being in the room, the curtains, although open on both sides, being closed at the foot of the bed; one of the witnesses, as he was standing by the fire, could not actually see the testator sign his name, and that witness signing upon a small table placed between the foot of the bed and the fire, where the curtains were still closed, the testator might not have seen them sign, it was, nevertheless, held that the testator and the witnesses signed their names in the presence of each other, as required by the ninth section of the act of Victoria, Sir H. J. Fust at the same time observing, that under the act where a paper is executed by the deceased in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign. But although it is not requisite a testator should actually see the witnesses subscribe their names, it is nevertheless essential that he should be in such a situation at the time such subscription is made that he must have seen them sign if he thought proper to look in

the direction in which they were; for where a testator had duly signed his will in the presence of three witnesses, who then went down stairs and attested his will there, where it was impossible he could have seen them sign their names, the will was holden void for want of having been attested in conformity with the Statute of Frauds: (*Broderick* v. *Broderick*, 1 P. Wms. 239.) In another case also (*Doe* v. *Manifold*, 1 Man. & Selw. 294), where the attesting witnesses retired from the room in which the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person, inclining himself forward with his head out of the door, might have seen the witnesses sign, but the testator himself was not in such a situation in the room that he might by so inclining have seen them, it was held that the will was not duly attested. Whenever, indeed, a subscription is made by the witness in a room separate from that occupied by the testator, the position of the parties must be such as to render them visible to each other. This point was expressly decided in a case which occurred after the Wills Act, 1 Vict. c. 26, came into operation. In the case here alluded to, on motion for probate, the witnesses admitted that they attested the paper in another room, separated from the bedroom of the deceased by a passage, both doors being open, so that they could hear him breathe, but could not have been seen by, and could not see him, this was not considered an attestation in the testator's presence within the meaning of that act, and the probate was rejected accordingly: (*In re Ellis*, 2 Curt. 305.) In a still more recent case also, an attestation in an adjoining room, the door wide open, but out of the range of the testator's eyesight, was held to be an insufficient attestation: (*Norton* v. *Bazett*, 27 L. T. Rep. 289.) And where a will is attested out of the testator's presence, it will be perfectly immaterial whether the witnesses retired at his request or not: (*Eccleston* v. *Patty*, 2 Show. 89; S. C. Carth. 79; Comb. 156.)

Testator's presence insufficient unless he himself has a mental knowledge of the fact of attestation.]—Nor will a signature in the testator's presence, even if made before his very eyes, at all times suffice, because there must be a mental as well as a bodily presence at the time of attestation. Hence, if a man, after he had signed his will in proper form, were afterwards to fall into a state of insensibility, an attestation subscribed by the witnesses during his state of unconsciousness would be inoperative: (*Right* v.

Price, Doug. 241.) Nor would an attestation be of any avail if made in a secret and clandestine way, although subscribed in the same room and close to the testator's elbow, if he himself was unaware of the transaction: (*Langford* v. *Eyre*, 1 P. Wms. 740.)

As to the qualification of the witnesses.]—It was formerly questioned, upon the Statute of Frauds, 29 Car. 2, c. 3, whether the words "credible witnesses," used in that statute, did not signify something more than competent witnesses; but Lord Mansfield, in *Wyndham* v. *Chetwynd* (1 Bur. 414), decided that it did not, and this decision seems to have settled the question. The Wills Act, 1 Vict. c. 26, has, however, gone far beyond the rule established by Lord Mansfield's decision, which only went to the extent that any witness who is considered a competent witness on a trial at law is a sufficient witness to the attestation of a will; but the act of Victoria goes to the extent of enacting, "that if any person who shall attest the execution of a will shall *at the time of the execution thereof*, or at any time afterwards, be incompetent to be a witness to prove the execution thereof, such will shall not, on that account, be considered as invalid;" so that now, so far from even a competent witness being required, no person, however criminal or incapable of credit, is disabled from being an attesting witness to a will, the act admitting of no kind of disqualification whatever.

Attesting witness incapacitated from taking any benefit under the will.]—But an attesting witness under the Wills Act, 1 Vict. c. 26, as also under a prior act of Parliament (25 Geo. 3, c. 6, s. 3), is totally incapacitated from deriving any personal benefit under the will, for by the 15th section of the act of Victoria, it is expressly enacted, "that if any person shall attest the execution of any will, to whom, or to whose wife, or husband any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband, be utterly null and void, and such person so attesting shall be admitted a witness to prove the execution of such will."

As to creditors being witnesses.]—A creditor may be a

witness to a will, notwithstanding the devised property is charged with the payment of debts (sect. 16), as may also the executor of a will: (sect. 17.)

As to wills under powers.]—As the law stood prior to the Wills Act, 1 Vict. c. 26, a person creating a power might have authorized an appointment of real estate by an unattested will, or a mere note in writing; and he might also have prescribed certain forms and ceremonies, which, although of themselves unnecessary to give any authenticity to the will, yet, unless complied with, a will attempted to be made in pursuance of such power would have been inoperative. Hence, if a seal had been required, a will under hand only, although made in strict conformity with the Statute of Frauds would not have sufficed. But where the power was to appoint by will generally, then the will, in order to embrace real estate, must have been executed and attested with all the formalities which the Statute of Frauds prescribes. But now by the Wills Act, 1 Vict. c. 26, no appointment made by will in exercise of any power will be valid, unless executed in the same manner as any other will is directed to be executed by that act; but if so executed, it will be sufficient, notwithstanding the terms of the power may prescribe other solemnities that have not been complied with: (sect. 10.)

Estates pur autre vie.]—Estates *pur autre vie* were not rendered devisable by the Statute of Wills (32 Hen. 8, c. 1), neither were they comprised in the fifth section of the Statute of Frauds; but by the twelfth section of the latter statute they are rendered devisable by will in writing, signed by the party devising the same; or by some other person in his presence, by his express direction, attested and subscribed by three or more credible witnesses. And if no such devise thereof shall be made, the same shall be chargeable in the hands of the heir, if the same shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple; and in case there shall be no special occupant thereof, it shall go to the executors or administrators of the party who had the estate thereof by virtue of the grant.

Whether the executors could have taken under an unattested will.]—Upon the construction of the last-mentioned section of the Statute of Frauds, it seems that although the will to pass the legal estate must have been attested by three or

more witnesses, yet, as the same section also enacts that if there shall be no special occupant thereof, it shall go to the executors, &c., of the party who had the estate thereof by virtue of the grant, it was considered that in case there was no special occupant they would have taken upon an equity attaching upon the character of executors, notwithstanding the will was not attested in conformity with the statute. In order, however, to settle all doubt upon the matter, the act of the 14 Geo. 2, c. 2, was passed, which, after reciting that such doubts had arisen, enacts that such estate *pur autre vie*, in case there shall be no special occupant thereof of which no devise shall have been made according to the Statute of Frauds, shall be applied as personal estate: (sect. 9.) This last-mentioned enactment, however, only applies to those cases where there is no special occupant, and it appeared still to remain a question whether the executors or administrators, having satisfied debts, were compelled to distribute property of this kind as personalty. Lord Hardwicke, in *Westfaling* v. *Westfaling* (3 Atk. 460), and in *Williams* v. *Jekyll* (2 Ves. sen. 683), expressed an opinion that it would go to the executors or administrators as special occupants. In *Atkinson* v. *Barker* (4 T. R. 229), Lord Kenyon considered it would be personal estate, but he seems to have grounded his opinion upon the erroneous supposition that it was distributable under the statute 14 Geo. 2. But all these doubts seem to have been finally settled by a decision of Lord Eldon, who determined that after satisfaction of debts it becomes distributable as personal estate: (*Ripley* v. *Waterworth*, 7 Ves. 425.) Since the act of 1 Vict. c. 26, wills of estates *pur autre vie* must be executed according to that act, which requires a uniformity in the execution of wills of every description, without any reference as to the nature of the property to be thereby disposed of. And if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in the case of lands in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold, or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets

in his hands, and go and be applied and distributed in the same manner as the personal estate of the testator or intestate: (1 Vict. c. 26, s. 6.)

Bequests of stock.]—The Bank Acts (1 Geo. 1, c. 19, s. 12; 30 Geo. 3, c. 2; 35 Geo. 3, c. 14), require a bequest of stock in the public funds to be attested by two witnesses: (*Bank of England* v. *Lunn*, 15 Ves. 596.) Still it seems that on a bequest of stock by an unattested will, the executors would have become entitled to such in their representative capacity, and as such have also become the trustees for the next of kin: but any will now made affecting stock must be executed and attested in the same way as a will relating to any other kind of property: (1 Vict. c. 26, s. 9.)

Wills of personal estate.]—The requisitions imposed by the 5th section of the Statute of Frauds, with respect to the execution and attestation of wills, related only to devises of real estate; consequently, no attestation, or even signature by the testator was essential, wills of personal property, and even unfinished instruments or letters, written by way of instructions, from which a more regular will was intended to be prepared, have been holden valid wills for passing chattels: (*Allen* v. *Manning*, 2 Add. 490.) Still, in cases of the latter description, it was incumbent on the party propounding such a paper to show that it was the testator's intention to have executed it, and that he had been prevented from so doing by death, or such severe indisposition as rendered him incompetent to perform any serious or rational act; for if it appeared that something more was intended to be done, and the party was not arrested by sickness, or death, such an unfinished instrument would not have been treated as a valid will: (*Abbott* v. *Peters*, 4 *ib.* 380.) The validity of papers of this kind therefore seems to havé depended upon the establishment of the fact of the testator's intention to execute them, and his being prevented from so doing by some sudden or uncontrollable circumstances; and this accounts for the diversity of decisions upon the subject which are to be found in the cases determined in the ecclesiastical courts. These questions can now, however, only relate to testamentary papers prior to the year 1838, as all subsequently made must be altogether inoperative, unless executed and attested in conformity with the Wills Act: (1 Vict. c. 26.)

As to nuncupative wills.]—With respect to nuncupative

wills, or wills by mere word of mouth only, which only related to bequests of personal property, the Statute of Frauds imposed so many obstacles in carrying them into effect, by requiring the proof of the testamentary words by the oath of three witnesses at least, and also that the will should have been made duriug the last sickness of the deceased at his own dwelling, unless he happened to be surprised by sickness when absent therefrom and died before his return (sect. 19); besides requiring the pretended testamentary words to be reduced into writing within six days after making of the will (sect. 20), and that process should issue to call in the widow or next of kin to contest the will if they pleased before probate of it would have been allowed (sect. 21), that the natural consequence was dispositions of this kind soon fell into disuse.

As to devises of copyhold.]—By the general law of copyholds, a surrender to the use of the will was required. But now the Wills Act (1 Vict. c. 26) provides, "that where any real estate of the nature of customary freehold or tenant right, or customary copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled, or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and after-

wards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such persons so entitled or claiming to be entitled to the same real estate as aforesaid:" (sect. 4.)

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls.]—And it is also further enacted, "that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such real estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties and services, as he is now entitled to for recovering and enforcing the same from and against the customary heir in case of a descent:" (sect. 5.)

CHAPTER XIV.

OF THE REVOCATION OF WILLS.

I. Preliminary Remarks.

How a will may be revoked.]—The liability to revocation forms one of the inseparable properties of a will, which no terms or expressions it may contain can either restrain or mollify. A revocation may be either express or implied. An express revocation, is where a will is revoked either by another will, or codicil, or other writing declaring that intent, or by the destruction of the instrument itself. An implied revocation, is where the operation of the instrument is defeated by some act of the testator inconsistent with, or contrary to, its dispositions, from which it must necessarily be inferred that he does not intend it shall continue in force; as, where a man, after making his will, and thereby devising his lands, conveys away the same lands to a third party so as to leave nothing in his possession upon which the will can operate, or such a total alteration takes place in his family circumstances, as to lead to the necessary inference that he no longer intended the dispositions contained in his will

made previously to the happening of those events should still remain in force.

Operation of the Statute of Frauds as to the revocation of wills.]—Previously to the Statute of Frauds (29 Car. 2, c. 3), a will might have been revoked by mere word of mouth (*Cranwell* v. *Sanders*, Cro. Jac. 497); but by the 6th section of that statute it was enacted, "that no devise in writing of any lands, tenements, or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all devises of lands and tenements shall remain and continue in force until the same shall be burnt, cancelled, torn, or obliterated by the testator, or by his directions in manner aforesaid; or unless the same be altered by some other will or codicil, *or other writing of the devisor*, signed in the presence of three or more witnesses declaring the same." With respect to wills of personal estate, the same statute provides, "that no will concerning any goods or chattels or personal estate shall be repealed, nor any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same shall be in the life of the testator committed to writing, and after the same writing thereof read to the testator and allowed by him, and proved to be so done by three witnesses at the least."

Alterations effected by Wills Act, 1 Vict. c. 26.]—Since the Wills Act, 1 Vict. c. 26, has come into operation, an instrument, although its sole object is to revoke an existing will, must be executed with precisely the same formalities as the will itself, otherwise it can have no operation whatever; a rule of law which now extends as well to bequests of personal property as to devises of real estate; for, by the 20th section of the act, "no will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke, *and executed in the same manner in which a will is hereinbefore required to be executed*, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

II. OF THE REVOCATION OF WILLS BY SUBSEQUENT WILL OR CODICIL.

Of revocation by subsequent will.]—The act of Victoria does not seem to make any alteration whatever in the law with respect to the operation of a subsequent will. In this respect therefore the law remains unaltered by that act. In order, however, that a subsequent will may revoke a prior one, it is essential that there should be an inconsistency between the dispositions contained in the two instruments, or else the latter instrument must revoke the prior one in express terms; consequently, if a man makes first one will and then another, and the latter contains no express clause of revocation, it will only have the effect of revoking the former one, so far as the dispositions in the two instruments are inconsistent with each other: (*Seymour* v. *Nosworthy*, Show. Parl. Cas. 146.) But if the second will contains a clause of revocation, then it will revoke a prior will, whether the dispositions in the two instruments be inconsistent with each other or not: (*Burtonshaw* v. *Gilbert*, Cow. 49, 55.)

Will declaratory of a future intent will be insufficient to revoke a prior disposition.]—A declaration by a testator that he intends to make a future disposition of his property will not of itself be sufficient to revoke a prior testamentary disposition of this property. To have this effect, a disposition must be actually made, or the will itself must be revoked in express terms. From a very early time indeed a distinction appears to have been taken as to whether the intention to revoke was present or future: (*Burton* v. *Goswell*, Cro. Eliz. 306.) And since the passing of the Statute of Frauds it has been held that what would not have been a revocation before the statute, will not be so since, though reduced into writing with all the formalities required by that statute: (*Griffin* v. *Griffin*, 4 Ves. 197, n.)

Whether destruction of a subsequent will sets up a prior will which the latter had revoked.]—Previously to the act 1 Vict. c. 26, if a prior will had been revoked by a subsequent one, and the latter had contained no clause of revocation, and had afterwards been destroyed by the testator, the prior will would have been thereby revived: (*Harwood* v. *Goodright*, Cow. 92.) But it seems that this doctrine was only applicable to wills of real estate; for the ecclesiastical courts required some stronger circumstances than the mere destruction of a subsequent will to set up a prior one; and

in order that a prior will, revoked by one subsequently made, might have been revived by the destruction of the latter instrument, it was necessary that, in addition to the latter circumstance, there should be some act of republication, or some revival by necessary implication, or something plainly to indicate that intention; and this might have been proved, either by declarations of the testator or other parol evidence which was admissible in those courts (although the rule was otherwise with respect to devises of real estate in courts of common law), or by the nature and contents of the instruments themselves: (*Lady Kircudbright* v. *Lord Kircudbright*, 1 Hag. 326.) All questions on this subject are now however set at rest by the Wills Act, 1 Vict. c. 26, with respect to all wills coming within the operation of that statute, viz.: all wills made after the commencement of the year 1838, for it is thereby enacted, "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless a contrary intention shall be shown:" (sect. 22.)

Of revocation by codicil.]—A codicil, as we have previously remarked, *ante*, p. 930, only revokes a will so far as there is an inconsistency in the dispositions contained in the two instruments, leaving every other disposition in the will untouched. Hence, where a testator by will devised lands to A., subject to a rentcharge to B., and afterwards, by a codicil, revoked the devise of the land to A. and gave it to another, without noticing the rentcharge, the latter was still held to be a charge upon the devised lands in the hands of the substituted devisee: (*Becket* v. *Harden*, 4 Mau. & Selw. 1.) So, where a testator, by his will, devised lands to A. in fee, and afterwards, by a codicil, devised the same lands in fee to the first son of B., who should attain the age of twenty-one years and assume the testator's name, it was held that the devise in the will was only revoked *quoad* the interest comprised in the executory devise in the codicil; and that, consequently, until B. had a son who should attain his majority and assume the testator's name, the property would pass to A. under the devise in the will: (*Duffield* v. *Duffield*, 3 Bligh, N. S. 261.) In another case also, a tes-

tator bequeathed in the following terms:—"As to my leasehold house in S., and my household goods and furniture there, and at S., and as to all my plate, linen, and china ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estates," he gave the same to A. By a codicil he revoked the bequest of the residue of his personal estate, and gave the same to B. It was held that the revocation extended only to the bequest of the residue, and did not include either the house, furniture, and other enumerated articles, viz., the plate, &c.: (*Clarke* v. *Butler*, 1 Mer. 34.) Again, where a testator devised his estate to C. for life, without impeachment of waste, and afterwards, by a codicil, directed his trustees to let until tenant for life married, the leases to be *impeachable for waste*, and the rents to be accumulated and laid out in lands to be settled to the same uses; it was contended that this was inconsistent with, and therefore revoked the will; but Sir W. Grant, M. R., held that there was no inconsistency, and nothing to take the timber from the tenant for life: (*Lushington* v. *Boldero*, Geo. Coop. 216.) And where a testator, by his will, devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon the trusts thereinafter expressed concerning his residuary personal estate; and then bequeathed his residuary personal estate upon certain trusts, and afterwards, by a codicil duly attested for devising freehold estates, revoked the residuary devise, and disposed of the personalty in a different manner; Sir John Leach, M. R., held that by this alteration in the disposition of the personal estate, the devise in the realty was not affected, the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate, in which case it is obvious that the revocation by the codicil ofthe residuary gift of the personal estate by the will would have been no revocation of the disposition of the produce of the freehold estate; and his honour observed, it could make no difference in principle that the testator saves himself the trouble of repeating those trusts, intents and purposes, by compendious words of reference: (*Francis* v. *Collier*, 4 Russ. 43.)

III. BY DESTRUCTION OF THE INSTRUMENT.

What will be such a destruction of the instrument as to amount to a revocation.]—The twentieth section of the act of Victoria, c. 26, only mentions "tearing, burning, or other-

wise destroying the same," by the testator or some other person in his presence, and by his direction, *with the intention of revoking the same;* but the word "*cancelling*," which is inserted in the revoking clause of the Statute of Frauds is omitted, from whence a question arises as to whether the simple act of cancellation would now revoke a will. Whether it would produce this effect or not seems to rest entirely upon the mode or *animus* in which the act of cancellation is done. If a testator were to cancel his will by tearing or cutting off his name, that would be treated as a tearing, or otherwise destroying with the intention of revoking the instrument within the express words of the act, and has, in fact, been so determined: (*Longford* v. *Little*, 3 Jones & Lat. 633.) But crossing out the name of the testator, the attestation clause, and the names of the witnesses with a pen, was considered insufficient (*Stevens* v. *Taprell*, 2 Curt. 458); for the Legislature having advisedly omitted cancelling among the modes of revocation, and substituted words of more unequivocal meaning, could not have intended that striking through with a pen should be a mode of revocation: (*ib.*) And in another case, decided some time after the Wills Act, 1 Vict. c. 26, came into operation, a will was held not to be revoked under the twentieth section of that act, although the words "this will is cancelled by me this 1st day of December, John Foray," was written at the top of the first page; the words "cancelled by me this 1st day of December," on each subsequent page, and at the end of it the words, "cancelled by me this 1st day of December, 1850;" for, notwithstanding there could be no doubt as to the intention, still that was insufficient unless the forms prescribed by the act for carrying that intention into effect were also complied with: (*In the goods of Foray*, 18 L. T. Rep. 177.)

Destruction by accident or mistake.]—And if a testator were to destroy his will, either by accident or mistake; as if, inadvertently, he were to throw ink upon it instead of sand; or, having two wills of different dates by him, he should by mistake destroy the latter instead of the former, or were to obliterate or destroy his will whilst labouring under insanity (*Scruby* v. *Fordham*, 1 Add. 74), neither of these acts would effect a revocation: (see also *Hyde* v. *Hyde*, 1 Eq. Ca. Abr. 108.)

Rule of the Prerogative Court as to the destruction of wills.]—The rule of the Prerogative Court as to the revocation of

wills by their destruction is, that if a will has been once traced into a testator's actual possession or custody, and it cannot afterwards be found, it will be presumed that he himself destroyed it *animo revocandi* (*Penhallow* v. *Robinson*, 3 Hag. 189, n.); and if it be found in his possession cancelled, that he cancelled it with the like intent: (*Hare* v. *Naysmith*, 3 Hag. 132, n.) But where a will is traced out of his possession, it will be incumbent on the party asserting the revocation to prove that the will came afterwards into the testator's custody, or was destroyed by his directions (*Colvin* v. *Frazer*, 3 Hag. 327); and in the latter instance it will be necessary to show, also, that the testator was present at the time, as both the Statute of Frauds, and the act of Victoria expressly require that the destruction should be made in the presence and by the direction of the testator; hence probate has been granted of a copy of a codicil which had been burnt by the order of the testatrix, but not in her presence: (*In re Dadd*, 23 L. T. Rep. 99.)

Effect of destruction of the will by a stranger.]—The act of cancellation, or even the total destruction of a will by a stranger, without any authority from the testator, will not revoke it, although it may produce the same result by rendering it unavailable, by destroying all evidence of the dispositions it contained. Still, under such circumstances, secondary evidence will be admitted to show what the contents of the will really were, or the will itself may be re-established, if the torn fragments could be collected together: (*Haines* v. *Haines*, 2 Vern. 441.)

Whether destruction of a duplicate will effect a revocation of the counterpart.]—Where a will consists of two parts, and a testator destroys one of them, the presumption will be that he intended to revoke them both: (*Utterson* v. *Utterson*, 3 Ves. & Bea. 122.) But this presumption may be rebutted by circumstances. If, as in the case of *Burtonshaw* v. *Gilbert* (Cow. 49, 55), the cancelled part were found in the testator's custody, and the uncancelled part in the custody of another, the inference that the testator intended to revoke both would then be plain, because he cancelled all that was within his reach. But where both parts are found in his possession, and one only of them is cancelled, the act assumes a more equivocal character; and if, in addition to this, it should appear that the cancelled part was first altered by the testator, and then cancelled together with the alterations, it is rather to be presumed

that the testator, being dissatisfied with these alterations, had designedly cancelled the part of his will which contained them, and had preserved the unaltered duplicate with a view of recurring to his original intention: (*Pemberton* v. *Pemberton*, 13 Ves. 310.) And it even seems that the presumption would be in favour of the will if both the parts were found in the testator's custody, one part mutilated, and the other part carefully preserved: (*Roberts* v. *Round*, 3 Hag. 548.)

How far the destruction of a will revokes a codicil.]—Whether the destruction of a will revokes a codicil or not seems to depend upon whether the codicil is so connected with the will as to render it incapable of an independent operation (*Ustick* v. *Bawden*, 2 Add. 116); for if so dependent upon the will, the testator's destruction of that instrument is a presumed revocation of the codicil; still it is but a presumption, and as such capable of being repelled by evidence showing a contrary intent: (*Medlicot* v. *Assheton*, 2 Add. 229.) And if a codicil is capable of subsisting independently of the will, it may be sustained notwithstanding the will be destroyed, and parol evidence will be admissible to show that the testator, when he destroyed the latter, did not suppose that act would effect a revocation of the codicil: (*Clongstoun* v. *Walcot*, 12 Jur. 422.)

Revocation of will under a misapprehension of facts will have no operation.]—If a person, under a misapprehension of facts, either destroys or revokes his will, and it can be shown that this misapprehension was the sole impelling motive for his so doing, it will be no revocation; as, for example, in a case where a testator by his will gave a legacy to A. and B., describing them as the grandchildren of C., and their residence to be in America, and by a codicil he revoked these legacies, *giving as a reason that the legatees were dead*, which supposition turning out to be erroneous, the legatees were held to be entitled on proof of their identity: (*Campbell* v. *French*, 3 Ves. 321; *Browning* v. *Budd*, 15 L. T. Rep. 1.) But it must be shown beyond all reasonable doubt that the erroneous supposition as to facts was the impelling cause for the revocation; for if a person merely gives as a reason that he is advised that his will is not valid at law, and under that impression makes another disposition of his property, as such devise does not depend upon the point of law, but is grounded on the advice only, without any reference as to the reality of the law, it will effect a revocation, let the point of law turn whichever way it may:

(*Attorney-General* v. *Lloyd*, 3 Atk. 550; *Attorney-General* v. *Ward*, 3 Ves. 327.)

IV. ALTERATIONS, ERASURES, OBLITERATIONS, AND INTERLINEATIONS.

Effect of obliteration or erasure upon other parts of the will.]—Under the Statute of Frauds (29 Car. 2, c. 3), a partial obliteration or erasure would not have revoked a will beyond the particular part erased: (*Short ex dem. Gastrell* v. *Smith*, 4 East, 419.) Now, by the Wills Act (1 Vict. c. 26), "No obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator, and the subscription of the witnesses be made in the margin, or in some other part of the will opposite or near to such alteration, or at the foot or end or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will:" (sect. 21.)

Brook v. *Kent.*]—In the case of *Brook* v. *Kent* (2 Curt. 343; Appeal to P. C.; 1 Notes Ecc. Cas. 93), which was decided after the above-mentioned act came into operation, a testator erased certain words in a will executed previously to the act, viz., July 1837, and wrote a memorandum attesting what the words erased originally were, but the memorandum was unattested, motion for probate of the will as it originally stood was rejected, in conformity with the construction put by the court upon the 21st section, but Sir H. Jenner advised that the will should be propounded in order that the opinion of the superior court might be taken upon the point. This was done, and the allegation propounding the will as it originally stood being rejected, an appeal was prosecuted in the Privy Council, where it was held that a will dated before the 1st of January, 1838, but re-executed, republished, or revived by a codicil subsequent to that date, comes within the statute; and that the alterations or obliterations made on or after the 1st of January, 1838, to a will dated before that time, must be governed by that statute; that by the 25th section an intention to revoke is absolutely necessary to effect a revocation; and that in

the same manner by construction with reference to the 21st section, intention must accompany acts of obliteration, interlineation, and alteration, as it accompanies the acts mentioned in the 20th section, which intention is to be ascertained as under the Statute of Frauds; that the judgment of the Prerogative Court, excluding evidence *dehors* the instrument, must be reversed. The making evidence of intention not to revoke absolutely, but by substitution, and such revocation having been ineffectual, their lordships decreed probate of the will in its original state.

Parol evidence how far admissible.]—The above case establishes the principle that parol evidence is admissible to show what the original words were that have been erased, with an intention to substitute other words after the execution of the will, and this doctrine has been confirmed by a still more recent decision: (*In the goods of W. Reeve*, 13 L. T. Rep. 103; *sed vide In the goods of Ann Rushout*, *ib.* 264.)

When erasures appearing on the face of the instrument, will, in the absence of evidence, be presumed to have been made.]—Where alterations or erasures are found on the face of a will, it seems that in the absence of all evidence, the inference of law is that they were made after the will was executed: (*Burgoyne* v. *Showler*, 1 Rob. 5.) But parol evidence will be admitted to rebut this presumption, and for that purpose evidence will be taken of statements made by the testator at a time previous to the execution of the will, indicative of an intention to devise his property in the manner in which it is given in the will as altered or interlined: (*Doe d. Shawcroft* v. *Palmer*, 17 L. T. Rep. 208.)

V. Subsequent Disposition of the Devised Property.

As the law formerly stood, and so it still remains with respect to wills made previously to the year 1838 (stat. 1 Vict. c 26, s. 34), if a man, subsequently to the making of his will, conveyed away the lands thereby devised, the will was thereby revoked; nor would a reconveyance of the same property to the testator have revived the operation of his will. So strictly, indeed, was this rule adhered to, that even an alienation to a trustee, without any intention of parting with the actual ownership, and even although the testator took back the old use, would nevertheless have caused a total revocation of a previous devise of the property

so dealt with. This doctrine was based upon the legal consequence resulting from the subject-matter upon which the will was to operate being withdrawn, from whence the devise necessarily became inoperative, because nothing was left for it to act upon; and the subsequent re-acquisition of the same property, even although the instantaneous effect of the Statute of Uses was regarded in the light of a new purchase, and, as the law stood prior to the year 1838, incapable of being comprised under any terms of devise contained in a will made previously: (*Vawser* v. *Jeffery*, 16 Ves. 519; 2 Swanst. 286.) And the same rule prevailed in the case of equitable, as well as legal estates, where the testator did any act to alter the nature of the trusts (*Lord Lincoln's case*, 1 Eq. Ca. Abr. 411, pl. 11; S. C. Show. Parl. Cas. 154); and it extended to things lying in grant as well as in livery: (*Sparrow* v. *Hardcastle*, 3 Atk. 793.) Nor would even the circumstance that the conveyance which had been made of the devised property was necessary to confer a testamentary power of disposition over it, have varied the rule; as in the instance, for example, of a tenant in tail making a conveyance to a tenant to the *præcipe* in order to suffer a common recovery for the purpose of barring the entail, and without which he would not have been enabled to devise the entailed property: (*Marwood* v. *Turner*, 3 P. Wms 163.) And even if a man seised in fee, but supposing he had only an estate tail, had suffered a recovery for the express purpose, and no other, than that of giving effect to his will, instead of so doing, it would have revoked it altogether: (*Sparrow* v. *Hardcastle*, *supra*.)

Alterations in the law effected by Wills Act, 1 *Vict. c.* 26.] —But now the Wills Act (1 Vict. c. 26) enacts, "that no conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death:" (sect. 23.) And as a will is by the act now made to speak from the time of the testator's death, and not, as formerly, from the time at which the will was made, it necessarily follows that a subsequent conveyance of the devised property can only revoke a prior devise of that property so far as it withdraws it from the devisee by conveying it to somebody else, or devoting it to some other purpose. But so far as the subsequent con-

veyance has this operation, the devisee will be deprived of all benefit under the devise, and will not be allowed to set up a claim to any proceeds arising from the sale of the property, notwithstanding the will should have directed its conversion, and the proceeds can be traced to an investment. Hence, if a testator contracts to sell the devised property, but dies before he executes the conveyance, the devisee, notwithstanding the legal estate still devolves upon him under the devise, will lose all equitable claim upon the property, and be compelled to convey his legal interest without being entitled to receive any portion of the purchase money in return for so doing: (*Knolleys* v. *Shepherd*, 1 Jac. & Walk. 499; and see 1 Jarm. Wills, 147, 149.)

VI. Of Revocation by alteration in the circumstances of the Testator's Family.

Although it is laid down in the books in general terms, that such an alteration in the circumstances of a testator's family as would lead to the presumption that he could not intend that his previous testamentary dispositions should remain unaltered would have revoked a prior will, still the only circumstances which have ever been held sufficient to produce this operation, have been marriage, and the subsequent birth of a child; two events of such importance in a man's lifetime, that, combined together, they were considered to produce such an alteration in his family circumstances as to revoke every testamentary disposition made by him before their occurrence: (*Sheath* v. *York*, 1 Ves. & Beav. 390.)

Marriage alone a revocation of a woman's will.]—And in the case of a woman, marriage alone was considered an event of sufficient importance to revoke a will made by her previously, which would not have been revived even by her husband's death: (Shep. Touch. 410; *Forse* v. *Hembling*, 4 Rep. 61; *Lewis's case*, 4 Burn. E. L. 51; *Doe* v. *Staple*, 2 T. R. 430.)

The Wills Act (1 Vict. c. 26) has made some considerable alterations in the law respecting the revocation of wills by the subsequent alteration in the testator's family circumstances, by providing that no will shall for the future be revoked by any presumption on the alteration of circumstances (sect. 19); previously to which it enacts that marriage shall be alone sufficient to revoke a prior will (sect. 18); so that now a will made by either a man or a woman will in either case be utterly revoked by their afterwards getting married.

Birth of children will have no effect upon the will.]—The act of Victoria is silent altogether about the birth of children; consequently, if a testator was married, but childless at the time of making his will, his afterwards having children would not in the slightest degree affect his will.

CHAPTER XV.

OF THE REPUBLICATION OF WILLS.

BEFORE the Statute of Frauds, a will, whether of real or of personal estate, might have been republished by mere word of mouth, and thus would even have had the effect of passing lands acquired by the testator subsequently to the making of his will. But now, the Wills Act (1 Vict. c. 26) makes every will to speak from the death of the testator, and not, as formerly, from the time of publication. It also makes every general residuary devise comprehend all such estate as the testator is entitled to at the time of his decease, as well real as personal, without any reference as to the time at which he acquired such property, so that all such real estate as the terms of the will is capable of comprehending which the testator may during his lifetime acquire and die possessed of, will pass under it; and it will not make the slightest difference in this respect whether such real estate was acquired by him prior, or subsequently to the time he made his will.

Effect of republication by codicil upon wills made previously to 1838.]—And even where a will made before the passing of the Wills Act (1 Vict. c. 26) is republished by a codicil made subsequently, it will, unless a contrary intent be expressed, have the effect of bringing the whole will within the scope and operation of the act, and thus pass all such real estate as the testator may happen to die possessed of, provided the will contains terms sufficiently ample to comprehend it, notwithstanding the whole of the property has been acquired subsequently to the publication of the will. Added to this, it will also have the effect of comprehending property which would not have been included under a description contained in a will made prior to the operation of the Wills Act (1 Vict. c. 26), had it spoken from that date instead of from the time of republication. Thus in *Wilson*

v. *Eden* (16 L. T. Rep. 152), where a testator made his will in 1813, giving all the residue, &c. of his personal estate, &c. to his brother A., whom he appointed executor, he also gave and devised all and singular his *manors, &c., lands, tenements, tithes, and hereditaments, situate at, &c., and all other his real estate, &c.*, to B. A. died in 1814, and in July of that year the testator made a codicil appointing another executor, and ratified and confirmed his will. It was held by the Court of Exchequer that the will having been thus republished by the codicil in July 1841, must, according to the provisions of sect. 34 of the Wills Act (1 Vict. c. 26), be deemed to have been made *at that date*, and consequently was governed by the 26th section of that statute, which enacts that *a general devise of lands* shall include leasehold as well as freehold lands; and therefore that the leaseholds passed under this will, which but for that act they could not have done in those cases where the testator was possessed both of freehold and leasehold property, unless the will itself contained some expressions denoting an intent to include both kinds of property under the same denomination: (*Knotsford* v. *Gardiner*, 2 Atk. 450.)

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London: Printed by JOHN CROCKFORD, 29, Essex-street, Strand.